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I. Diversity in Legal Scholarship: The Debate

In recent years a number of legal scholars have argued that the work of minority scholars and teachers[1] should be encouraged and expected to play a special role in the process of defining and shaping legal issues that particularly affect minority communities in the United States.[2] They have asserted that minority scholars possess special insights about how the law affects and has affected members of minority communities, and that it is therefore important for minority scholars to comprise a significant proportion of the participants in debates about legal issues that particularly affect minorities. They also assert that, compared to the proportion of minorities in the general population and in the legal community in general, minority scholars are underrepresented on legal faculties. In addition, some legal scholars claim that the work of minority scholars is not published or cited with the frequency of the work of majority legal scholars, even on topics that are of greater importance to the minority community, such as civil rights law. They call for more minority scholars to be hired, published, read, and cited.

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1. The focus of the immediate debate and of this paper is on law school faculty and legal scholarship. Faculty members do comprise a substantial, perhaps major, portion of the scholars who are concerned with how our legal system operates and how it should be reformed. They are also responsible for teaching the next several generations of lawyers how to use that legal system and the values the system embodies. However, the discussion in this paper is relevant and must be applied to all lawyers who play a role in the process of formulating and reforming legal doctrine: judges, government regulators, legislators, and lawyers who argue before courts or try to influence legislation either on behalf of clients or according to their own ideas of what the law should be.

2. *See* Derrick A. Bell, Jr., *The Unspoken Limit of Affirmative Action: The Chronicle of the DeVine Gift*, in AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 140 (1987); Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 1, 3-4, n.2 (1979); Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209, 216-17 (1993); Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39; Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 566-73 (1984); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 1-2 (1988); Mark Tushnet, *Spite Fences and Scholars: Why Race Is and Is Not Different*, 26 CONN. L. REV. 285, 288-93 (1993); *see also* Kemberle Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 1-12 (1989); Christopher Edley, Jr., *The Boycott at Harvard: Should Teaching Be Colorblind?*, WASH. POST, Aug. 18, 1982, at A23. *See generally*, Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705.

To achieve these goals, they call for a legal scholar's minority status to be counted as a positive qualification for participation in the academic legal community. Overall, these scholars claim that the work of minority legal scholars should be presumed to provide a "minority perspective" different from the work of dominant community scholars.

In *Racial Critiques of Legal Academia*,[3] Professor Randall Kennedy has responded that the use of race as a qualification, albeit a positive one, should be avoided because its use in the past as a way of selecting people for jobs or of validating social classifications has always proved to have invidious effects.[4] Professor Kennedy agrees that the experiences and viewpoints of the minority community should influence the development of legal scholarship in areas such as civil rights but asserts that the real issue has always been and remains the intellectual merit of the proffered scholarship, because an author's race or skin color cannot tell us whether his or her work has intellectual merit.[5] These assertions are correct as far as they go; they simply do not go far enough.

By speaking in favor of intellectual merit, Professor Kennedy is taking a path traditionally espoused by the dominant community, which appears to have contributed to the antagonism his article has generated among critical race scholars.[6] However, he clearly rejects at least some practices that traditionally have been used as measures of intellectual merit. Professor Kennedy points out, for example, that citations to an article that are designed to reward friends or colleagues, advance one's own career or increase the

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3. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). Professor Kennedy's main focus is showing how Professors Bell, Delgado and Matsuda, supra note 2, have not adequately tested or persuasively presented their claims that white prejudice is primarily responsible for the relative exclusion of minority scholars and their work from elite law schools and mainstream legal discourse, and arguing that intellectual merit is preferable to racial origin as a way to assess scholars and their ideas. *Id.*

4. *Id.* at 1786-87.

5. *Id. passim*, but especially, at 1772 n.114, 1805.

6. *See, e.g.*, Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990). For other criticisms of Kennedy, see also Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990); Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990); Scott Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844 (1990).

reputation or prestige of one's school are all nonmeritocratic, however common in practice, and that the resulting citations cannot be relied on as an indication that the works cited actually have intellectual merit.[7]

Based on this rejection of such traditional practices, as well as the general tenor of Professor Kennedy's article and the care with which he cites and characterizes his opponents, I believe that his arguments express a good faith concern for merit in its best sense. Expressed in traditional terms, it is the valid concern that legal scholarship be recognized and scholars
rewarded for furthering the search for "truth," for helping the scholarly community and society better understand "reality." Every scholarly discipline is

> an intellectual activity . . . reflecting as well as molding the modern understanding of reality. . . . Every scholar or scientist who deals with a subject matter from the past does so in terms of his present grasp of reality and the results of his research in turn flow into the current body of knowledge from which the continual modification of our understanding of reality emerges.[8]

However, as recognized both by the critical race scholars whom Professor Kennedy is addressing and by a much larger number of feminist scholars, this only opens further, rather than closes, the issue of how intellectual merit is to be recognized.

Philosophers have long probed the difficulties of knowing what we know and what we do not know and of separating objective reality from our subjective examination of the world.[9] But

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7. Kennedy, *supra* note 3, at 1807.

8. JAMES M. ROBINSON & HELMUT KOESTER, TRAJECTORIES THROUGH EARLY CHRISTIANITY (1971), *quoted in* ELISABETH SCHUSSLER FIORENZA, IN MEMORY OF HER: A FEMINIST THEOLOGICAL RECONSTRUCTION OF CHRISTIAN ORIGINS xvii (1983); *see also, e.g.*, Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship,* 42 FLA. L. REV. 25, 26 (1990) (scholarship should address questions of knowledge, i.e., how we construct truth); Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education,* 90 YALE L.J. 955, 967-68 (1981).

9. *See, e.g.*, MARTIN J. WALSH, A HISTORY OF PHILOSOPHY 307-308 (1985) (Hume taught: "The bounds of experience . . . are also the bounds of all knowledge"); *id.* at 316-17 (Kant believed that human understanding is incapable of knowing things as they are in themselves, and that knowledge is a synthetic, relational product of the activity of the senses or the ego); GEORGE L. ABERNATHY & THOMAS A. LANGFORD, INTRODUCTION TO WESTERN PHILOSOPHY 273 (1970) (to Schelling consciousness is the only object of which we have immediate knowledge); *id.* at 295 (Schopenhauer distinguished between the phenomenal world, the world as experienced and rationally understood, and the nominal world, the world

only recently have feminist philosophers and scholars in other fields begun to illuminate some of the additional factors, previously ignored or taken for granted, that affect each person's subjective examination of the world, thereby changing the perception of "objective reality."[10]

The factor most explored by feminists is the gender of the subject, the examiner of the world. Feminists have claimed, and have persuaded numerous other scholars and students across many disciplines, that experiencing the world as members of one sex frequently leads to ways of seeing the world different from those experienced by the other sex.[11] These different ways of seeing and understanding, what feminists call different "perspectives" of the world, create what amount to different realities for the two sexes. The perceptions of most men appear to reflect one "objective reality." The different set of perceptions of most women, arising from different experiences, appear to reflect a different "objective reality."[12] In effect, feminists claim that our different gender perspectives actually create different realities for women and men, realities that only appear "objective" to their beholders.[13]

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as it stands independently of the knower's effort to apprehend it).

10. *See* Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered,* 101 HARV. L. REV. 10, 14, 57-73 (1987); Robin West, *Jurisprudence and Gender,* 55 U. CHI. L. REV. 1, 3-4 (1988). *See generally,* IAN G. BARBOUR, MYTH MODELS, AND PARADIGMS: A COMPARATIVE STUDY IN SCIENCE AND RELIGION (1974); A FEMINIST PERSPECTIVE IN THE ACADEMY (E. Langland & W. Gove eds., 1981); JUDITH LEWIS HERMAN, FATHER-DAUGHTER INCEST (1981); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives on Sexual and Racial Harassment Litigation,* 1 TEX. J. WOMEN & L. 95 (1992); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes,* 2 COLUM. J. GENDER & L. 1 (1992); Janet Moore, *Covenant and Feminist Reconstructions of Subjectivity Within Theories of Justice,* 55 LAW & CONTEMP. PROBS. 159 (Summer 1992).

11. *See* Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law,* 42 U. MIAMI L. REV. 29, 44 (1987); Minow, *supra* note 10, at 68. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMENS' DEVELOPMENT (1982).

12. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory,* 3 WISC. WOMEN'S L.J. 81, 85-86 (1987); Menkel-Meadow, *supra* note 11, at 44-45; Minow, *supra* note 10, at 14, 68.

13. Cf. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence,* 8 SIGNS 635, 651 n.5 (1986) ("The feminist criticism is not that the objective stance fails to be truly objective because it has social content, all the better to exorcise that content in the pursuit of the more truly point-of-viewless viewpoint. The criticism is that objectivity is largely accurate to its/the/a world, which world is criticized; and that it becomes more accurate as the power it represents and extends becomes more total");

This is not a claim that women are essentially different from men, or that all women think and perceive the same things or perceive them in the same way. Rather, it is a claim that one's position within society through different biological capabilities, different experiences, different social expectations or some combination of these influences one's perspective in viewing the rest of the world, and thereby influences one's understanding of the world.[14] Insofar as most women share the possibility of becoming pregnant for part of their lives and most also share the experience of being relatively weaker physically than most men, social experiences in which these two factors are implicated, such as rape,[15] are likely to be perceived by most women in substantially the same way. Furthermore, since no man shares the possibility of becoming pregnant and most men have substantially more physical strength than most women, most men's perceptions of the same social encounters are likely to differ substantially from those shared by most women.

Women's perceptions and understanding do overlap with those of men because women and men are often similarly situated with respect to some matters. Some women may see some aspects of the world with or from a characteristically "male perspective."[16] By the same token, some men are able to perceive and understand at least some aspects of the world with or from a female perspective, either through experience, education and effort, or through individual similar situation.

Jules L. Coleman, *Truth and Objectivity in Law*, 1 LEGAL THEORY 33, 47, 64 (1995) (advocating the position that concepts of truth and objectivity in legal discourse are consistent with a view that all knowledge is based on the internal point of view or situatedness of the knower).

14. *See, e.g.*, Fineman, *supra* note 10, at 2, 14 ("The idea of a gendered life is *not* the same as asserting the notion of 'essential' femaleness. The concept of a gendered life is based on the belief that most differences between the sexes are socially manufactured, not inherent. . . . [R]egardless of how fashioned, differences matter.").

15. I am not claiming that the possibility of pregnancy is the key to understanding women's experience of rape. It is an important factor in shaping women's desire for sexual intercourse with men they know, which, as we shall see, is implicated in men's and women's different experiences of coerced "date sex" or "acquaintance sex." All women who have written on rape seem to agree that the key injury caused by rape, whether by a man known or unknown, is the violation of psychological and physical integrity experienced when one is treated as an object rather than a subject.

16. This may be a phenomenon of "false consciousness" resulting from "training," or because this one woman is situated with respect to the matter similarly to most men.

Yet, despite these qualifications, reality that appears objective to a viewer is more likely to be unexamined than truly objective. Seeing the world from another's perspective requires, first, self-conscious examination of how one's own views of the world have been constructed and, second, an effort to "stand in the other's shoes," to imagine the view from the other's vantage point in the world in order to understand the other's "reality."[17]

As suggested above, one of the primary responsibilities of scholars, or academics generally, is production of information and analysis about the world in order to "further truth" by helping society discover the extent to which the world or reality perceived and described by our predecessors represents only a partial knowledge of the world. Feminists and critical race scholars simply assert that there are different ways "perceived reality" may be partial, and consequently there must be different ways of overcoming the limitations of past perspectives. Feminists and critical race scholars assert that because law and legal scholarship have also been formulated by human beings with limited perspectives, they too must reflect limited perspectives,[18] which typically are not overtly identified and often are not conscious. Furthermore, when seemingly neutral legal concepts have been given content through application by the hitherto largely male, and in any event, male-influenced participants in the legal system, they do not have a neutral effect.[19]

> Whereas traditional academic scholarship has identified humanness with maleness and understood women only as a peripheral category in the 'human' interpretation of reality, the new field of women's studies not only attempts to make 'women's' agency a key interpretive category but also seeks to transform androcentric scholarship and knowledge into truly human scholarship and knowledge, that is, inclusive of *all* people, men and women, upper and lower classes, aristocracy and 'common people,' different cultures and races, the powerful and the weak.[20]

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17. Minow, *supra* note 10, at 57-73.

18. Menkel-Meadow, supra note 11, at 43-48; Minow, *supra* note 10, at 85.

19. A central tenet of feminist legal theory is that "[o]nly the effects of a legal system provide significant evidence of whether it is non-discriminatory." Lucinda Vandervort, *Mistake of Law and Sexual Assault: Consent and Mens Rea*, 2 CAN. J. WOMEN & L. 233, 262 (1987-1988).

20. FIORENZA, *supra* note 8, at xx.

Given these insights, how does one decide whether a work of legal scholarship has "intellectual merit"? We start by returning to the basic questions used to evaluate every work of legal scholarship or analysis: does this work help us better understand what the law is accomplishing, what the law should accomplish, and from whose point of view or interest the law operates?[21] We may find that the point of view or interests advanced by a law belongs to entrepreneurs, bureaucrats, environmentalists, divorced women with children to feed and clothe, divorced men who wish to support new families, members of racial or ethnic or other minorities who regularly encounter housing or job discrimination, or one of an almost infinite number of other points of view. If a work of legal scholarship helps us answer these three questions, then it has intellectual merit despite the fact that it is published in an obscure journal by someone who graduated from an unaccredited night school and is never cited by articles published in prestigious journals.

II. Rape, Male Perspectives, and the Law

The law of rape and the history of its reforms over the last forty years provide a useful vehicle for exploring how different experiences, yielding different perspectives, can affect the formulation or application of legal principles. Rape provides an appropriate vehicle for this exploration because traditionally the person accused of rape was always a member of the dominant group in society—men, while the accuser was always a member of a subordinate group—women.[22] While there are other

21. Despite Judge Richard A. Posner's protestations that he wants "experimentation" in legal scholarship, he seems unwilling to accept experimentation that involves self-conscious identification of perspective by minorities. *See* Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1159-61 (1990); *see also* Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095 (1992).

22. More recently, many state laws on sexual assault have been drafted in gender neutral terms, thus including male on male rape, female on female rape or, theoretically, female on male rape. Male on male and female on female rape in particular implicate different subordinate social groups and a source of probably even greater fear and prejudice than heterosexual sex, *i.e.*, homosexuality. *See* MALE VICTIMS OF SEXUAL ASSAULT (Gilliam C. Mezey & Michael B. King eds., 1992). Consequently, the investigation and prosecution of such sexual assaults probably do present many problems similar to those discussed in this article, although for different and perhaps even more complex reasons. Because the process of identifying biases or stereotypes through the lens of a different perspective is unique to each perspective, this article will discuss only the rape of women by men.

dominant/subordinate groupings within Western society, the gender groupings involved in rape cut across all other important group categories such as race,[23] religion and class.[24] Like most significant differences among people, the male/female difference traditionally has been freighted with the lack of understanding and irrational fears that are particularly fertile ground for the development of stereotypes and prejudice.

The law of rape in all English-speaking countries developed as part of the English common law in the early 17th century. At that time and for the three centuries that followed, all official actors in the criminal justice system—judges, prosecutors and lawyers who represented defendants, and eventually legislators in the former colonies—were Anglo-Saxon males. During this period the law of rape changed little. In the United States the American Law Institute sponsored the drafting of a Model Penal Code during the mid-1950s. While some attempt at law reform was made, the process continued to be dominated by white males and little substantive change occurred.

In the early 1960s women in the United States and other Western countries began to talk to each other about their lives and their common experiences as women. They began to analyze the issues that affected women in special ways—employment opportunity, sexual harassment in the workplace, divorce and custody proceedings, and domestic abuse. Rape received early attention from women, from women lawyers in particular, and especially

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23. White feminists have been criticized by African-American women scholars for slipping into essentialism in analyzing many women's issues because of the general but unstated assumption that all women share the same experience, regardless of race or socio-economic background. *See generally* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

For discussions of some of the complexities that result when rape involves issues of both gender and race, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991) (the law of rape was designed and implemented to protect white women in their unofficial status as the property of white men and has been a significant instrument of white supremacy, carried out through lynchings in earlier times and vastly unequal conviction rates today); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 141 (1983) (the legal system's treatment of rape has furthered racism by disproportionately targeting Black men for punishment and refusing to give raped Black women redress, and has denied the reality of all "women's sexual subordination by creating a social meaning of rape which implies that the only type of sexual abuse is illegal rape and the only form of illegal rape is Black offender/white victim.").

24. The trial and verdict in the rape prosecution of William Kennedy Smith provides a recent example of the importance of class to analyzing how rape law is applied in practice.

from women who had been raped.[25] Their experiential insights led to different kinds of sociological and psychological research on rape[26] and to fresh legal analyses of rape law.[27] This article uses this rich literature as an example of how particularized viewpoints can give special insights on which to base legal and social reforms that are more inclusive of previously subordinate groups.

To consider these materials in context, it is necessary first to review some general goals and values of the common law criminal justice system and some special problems encountered in trying to prosecute crimes of rape and other sexual assaults.

A. Special Considerations

The common law has always stressed competing and partially incompatible values in its criminal law. The primary purpose of the criminal law has always been to convict and punish criminals and,

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25. *See* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); SUSAN ESTRICH, REAL RAPE (1987); Lynne N. Henderson, *Review Essay: What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 221 (1988).

26. *See, e.g.*, PAULINE B. BART & PATRICIA H. O'BRIEN, STOPPING RAPE: SUCCESSFUL SURVIVAL STRATEGIES (1985); HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND THE LAW (1980); GREGORY M. MATOESIAN, REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM (1993) (applying methods of social linguistics to analyze interactions typically used in cross-examination of rape complainants); Susan B. Bond & Donald L. Mosher, *Guided Imagery of Rape: Fantasy, Reality, and the Willing Victim Myth*, 22 J. SEX RES. 162 (1986); Eugene Borgida & Phyllis White, *Social Perception of Rape Victims: The Impact of Legal Reform*, 2 L. & HUM. BEHAV. 339 (1978); James V. P. Check & Neil M. Malamuth, *Sex Role Stereotyping and Reactions to Depictions of Stranger Versus Acquaintance Rape*, 45 J. PERS. & SOC. PSYCH. 344 (1983); E. Galton, *Police Processing of Rape Complaints: A Case Study*, 4 AM. J. CRIM. L. 15 (1976); Diana Scully & Joseph Marolla, *"Riding the Bull at Gilley's": Convicted Rapists Describe the Rewards of Rape*, 32 SOC. PROB. 251 (1985).

27. For some analyses of specific state laws or proposals, see Leigh Bienen, *Rape I*, 3 WOMEN'S RTS. L. REP. 45 (1976); *Legislative Note: Michigan's Criminal Sexual Assault Law*, 8 U. MICH. J.L. REF. 217 (1974); Christopher W. Nicoll, *Idaho Code § 18-6105: A Limitation on the Use of Evidence Relating to the Prior Sexual Conduct of the Prosecutrix in Idaho Rape Trials*, 15 IDAHO L. REV. 323 (1979); *Rape and Other Sexual Offense Law Reform in Maryland, 1976-1977*, 7 U. BALT. L. REV. 151 (1977); Sarah Weddington, *Rape Law in Texas: H.B. 284 and the Road to Reform*, 4 AM. J. CRIM. L. 1 (1975-1976); E. Sue Bernie, note, *Florida's Sexual Battery Statute: Significant Reform but Bias Against the Victim Still Prevails*, 30 FLA. L. REV. 419 (1978). For general analyses, see sources cited *supra*, note 25, and *e.g.*, Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988); Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277 (1993); Crenshaw, *supra* note 23; Vandervort, *supra* note 19; Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990); Wriggins, *supra* note 23.

as a result, to deter crime.[28] In addition, and unlike the criminal law systems in most if not all authoritarian societies, an important goal of the criminal law is to *prevent* the conviction and punishment of innocent people[29] through negligence or callous indifference of officials, manipulation of the system for personal reasons by those in power, or inadvertence. Preventing conviction of innocent defendants has always been of particular importance where conviction could result in lengthy imprisonment or death, as was traditionally the case for the crime of rape.[30] The high value placed upon avoiding conviction of the innocent is reflected in rules such as the presumption of innocence,[31] the defendant's right to confront his accuser,[32] the defendant's right to defend himself against all the evidence presented by the prosecution and the prosecution's all important burden of proving guilt beyond a reasonable doubt.[33] These protections for defendants reflect the basic policy judgment that it is better for society that some guilty people remain unpunished than for innocent people to lose their freedom, much less their lives.

Against this background, two evidentiary problems common in rape trials take on special importance. First, because the crime of rape generally lacks witnesses other than the victim, the analysis of physical evidence plays an important role in the prosecution of the accused offender. Until relatively recently, however, analysis of much of the most important physical evidence produced by rapes was beyond the competence of forensic experts. Second, rape is a crime that involves an area of social life laden with deep-seated taboos, inhibitions and psychological conflicts.

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28. *See e.g.*, WAYNE R. LAFAVE & AUSTIN SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.2(e), § 1.5 (1986).

29. *See e.g., id.* § 1.4.

30. Murder, treason and rape have been the only three capital crimes in common law countries. Authorized or mandated prison sentences for rape traditionally ranged from 20 years to life imprisonment. *See, e.g.*, LA. REV. STAT. ANN. § 14:42 (West 1986) (Following the 1942 rape law reform the offense of "aggravated rape" carried the death penalty; other rapes were punishable by a maximum term of 20 years).

31. American Law Institute, 1 MODEL PENAL CODE AND COMMENTARIES, § 1.12, 1.12 cmt. (1980).

32. *See, e.g.*, U.S. CONST. amend. VI.

33. MODEL PENAL CODE § 1.12(1), 1.12(1) cmt. (Official Draft & Rev. Comments 1980). The prosecution's burden of proof in a criminal trial is a much higher standard than any applied in a civil action, even an action for a civil penalty such as a fine.

B. A Male Perspective of Sexual Encounters

From the beginning, these two special problems have reinforced the dominant male perspective on rape and contributed to related gender prejudices. Apparently because of the deep-seated taboos, inhibitions and psychological conflicts associated with sex, charges of rape that do not involve strangers are treated by police, prosecutors, judges, juries and even a complainant's friends and family in a substantially different manner than are rapes perpetrated by strangers.[34] This distinction appears to be grounded in men's fear of unfounded prosecutions based solely on the word of the complainant against the accused.[35]

These fears are reflected in the earliest published formulation of and commentary on the English common law, written by Sir Matthew Hale shortly before his death in 1676.[36] In addition to setting out the basic doctrine and evidentiary principles applicable to the crime of rape, Lord Hale offered a now famous comment:

> It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.[37]

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34. *See* CATHARINE A. MACKINNON, *A Rally Against Rape*, *in* FEMINISM UNMODIFIED 81 (1987); ESTRICH, *supra* note 25, at 6-7. Estrich follows the terminology used in a 1960s study conducted by University of Chicago Professors Harry Kalven and Hans Zeisel. Rape by an unarmed man of a woman he knows is denoted a "simple rape" to distinguish such situations from "aggravated rapes" which involve extrinsic violence (guns, knives or beatings), multiple assailants, or no prior relationship between the accused and the complainant. *Id.* at 4. This terminology does not necessarily coincide with that of state statutory definitions, *cf.* LA. REV. STAT. ANN. § 14:42 (West 1986), and has been criticized by other feminist scholars, *see, e.g.*, Henderson, *supra* note 25, at 195-96.

35. SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 207-14 (1979).

36. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS TO THE CROWN (S. Emlyn 1736).

37. *Id.* at 635. Hale bolstered his caution by recounting two cases of false accusations. Both cases involved young unmarried women, one of whom was apparently encouraged by her parents, and one case, possibly both, involved unmarried men. *Id.* at 627. It is possible that such false accusations by unmarried women without dowries were actually encouraged by the law of the day because the law provided only one punishment, execution, and permitted an accuser to "redeem" the offender's life by electing to marry him. *Id.* The offender could refuse the offer, *id.*, but an unmarried man would undoubtedly think twice before doing so. Hale does not note this possible incentive for false rape accusations, and he provides no indication of how many convictions were obtained during the period in which these two cases of false accusation occurred.

Hale's caution was subsequently adopted as part of special jury instructions for rape cases in many American jurisdictions and was even considered mandatory by some courts.[38]

The emphasis on the likelihood of false charges by complainants and the bias and fear that this possibility engenders can be seen in numerous statements of state court judges as well as in Wigmore's influential treatise on trial evidence. Wigmore admonished that: "*No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.*"[39]

These opinions were not formed in a vacuum. As Wigmore's most recent reviser notes in his defense, "Wigmore was a child of his times."[40] Those times, beginning at least in the seventeenth century when Lord Hale was Chief Justice of the King's Bench and continuing through the 1960s, did not simply produce general fears and biases. They led to the formation of many specific (and sometimes conflicting) stereotypes or myths about women and rape that in turn influenced how the law of rape was formulated and how

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38. The Model Penal Code, drafted in the 1950s, retained a form of Hale's cautionary instruction. MODEL PENAL CODE § 213.6(5) (1980). However, all state courts that have confronted the issue recently have held that such a cautionary instruction is not required. *E.g.*, Burke v. State, 624 P.2d 1240 (Alaska 1980); Marr v. State, 494 So. 2d 1139 (Fla. 1986); State v. Gong, 764 P.2d 453 (Idaho Ct. App. 1988); Rhoades v. State, 468 A.2d 650 (Md. Ct. Spec. App. 1983); State v. Lovato, 702 P.2d 101 (Utah 1985); State v. Murray, 375 S.E.2d 405 (W. Va. 1988). In State v. Liddell, 685 P.2d 921 (Mont. 1984), the court held that such an instruction would constitute an improper comment on the evidence. *Id.*

39. 3A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW [hereinafter "WIGMORE ON EVIDENCE"] § 924a (3d ed. 1940) (original emphasis; footnote omitted); *see also* 3A WIGMORE ON EVIDENCE § 924a (Chadbourn rev. 1978). Wigmore justified his caution by describing numerous "cases" of false rape accusations, most involving adolescents, reported by two psychologists. *Id.* The tone of the psychologists and the evidence on which they base their conclusions does not invite confidence in their reports by today's standards.

Feild and Bienen report in JURORS AND RAPE that the 1915 study on which Wigmore based his recommendation, *Pathological Lying*, has now been repudiated, and that the 1937-38 Report of the American Bar Association Committee on Improvements in the Law of Evidence, which he cites in his 1940 edition as additional and independent authority for this view was authored by Wigmore himself in his capacity as chair of the committee. FEILD & BIENEN, *supra* note 26, at 200 n.108. *But see* 1A WIGMORE ON EVIDENCE § 62 (Tillers rev. 1983) (Wigmore urged "the admissability of character for unchastity [as] a necessary safeguard against the possibility of . . . prosecutions instigated by women having a psychological disposition to 'imaginary and false charges.'").

40. 1A WIGMORE ON EVIDENCE, § 62 n.21 (Tillers rev. 1983). The first edition of Wigmore's treatise was published in 1904. The third edition, the last prepared by Wigmore himself, appeared in 1940.

general rules of trial procedure were applied—or not applied—to rape cases. The following are some of the most prevalent of these myths or stereotypes:

1. Women fantasize about rape and want forced sex imposed on them.[41]

2. When a woman says "no" to intercourse, she often really means "yes."[42]

3. "If [a woman is] going to be raped, [she] might as well relax and enjoy it."[43]

4. "[W]omen often provoke or precipitate sexual assault";[44] they "seduce" men to rape them.[45]

5. Nice women do not get raped.[46]

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41. Henderson, *supra* note 25, at 227; *see* FEILD & BIENEN, *supra* note 26, at 32. Several researchers have found that a significant portion of convicted rapists justify their actions by arguing that their victims enjoyed the experience despite use of weapons and infliction of serious injuries or even death, and that the rapists had helped the *victims'* fantasies come true. Check & Malamuth, *supra* note 26; Scully & Marolla, *supra* note 26. *But see* Bond & Mosher, *supra* note 26, at 177 ("Neither the crime of rape nor the imagining of a realistic rape generate sexual arousal, enjoyment, or pleasure.") For the importance of distinguishing between seduction fantasies and rape fantasies, *see* Eugene J. Kanin, *Female Rape Fantasies: A Victimization Study,* 7 VICTIMOLOGY 114 (1982).

As Nancy Friday pointed out in her pioneering work, MY SECRET GARDEN, rape fantasies comprise a small portion of women's sexual fantasies and the women who reported them distinguished quite carefully between the function of rape as a fantasy—to relieve the guilt learned as "good little girls"—and the terrifying prospect of rape in reality. NANCY FRIDAY, MY SECRET GARDEN: WOMEN'S SEXUAL FANTASIES 47-51, 76, 109-110 (1973).

42. *See* DONAL E.J. MACNAMARA & EDWARD SAGARIN, SEX, CRIME AND THE LAW 45 (1977); MODEL PENAL CODE § 213.1 cmt. 4 (1980)("*Often* the woman's attitude may be deeply ambivalent. She may not want intercourse, may fear it, or may desire it but feel compelled to say 'no.'" (emphasis added)). *See also* Roger B. Dworkin, Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard,* 62 YALE L.J. 55, 67 (1952); Note, *The Resistance Standard in Rape Legislation,* 18 STAN. L. REV. 680 (1966).

43. BROWNMILLER, *supra* note 25, at 311; *see also* FEILD & BIENEN, *supra* note 26, at 31.

44. *See* Seaboyer v. Queen, [1991] 2 S.C.R. 577, 659 (L'Heureux-Dube, J., dissenting). There is a myth that a rapist is a stranger who leaps out of the bushes to attack his victim and then abruptly leaves. Because what a complainant describes "often does not match what jurors *think* rapists do, his behavior is held against her." If a woman says her rapist did anything else, then she must be the cause of what happened. *Id.* at 653.

45. *See* LINDA BROOKOVER BOURQUE, DEFINING RAPE 68 (1989); Scully & Marolla, *supra* note 26.

46. *See* FEILD & BIENEN, *supra* note 26, at 31.

6. If a woman has previously consented to have extramarital sex, she is promiscuous and probably will consent to have sex with any man who asks.[47]

7. African-American women are generally promiscuous.[48]

8. A woman cannot be raped against her will; "if she really wants to prevent a rape, she can."[49]

9. If a woman is raped, her natural response is to report it to the police as soon as possible.[50]

10. Men who rape are psychopathic or emotionally ill; normal men do not commit rape.[51]

11. Women are raped only by strangers; "[r]ape of a woman by a man she knows can be defined as a 'woman who changed her mind afterward.'"[52]

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47. As articulated by The Honorable Mme. Justice L'Heureux-Dube in her dissent in *Seaboyer v. Queen*, women are considered to be either "madonnas or whores." *Seaboyer*, [1991] 2 S.C.R. at 652 (L'Heureux-Dube, J., dissenting). The logical result of this myth is not only that the rapists of many ordinary women who have had multiple sexual partners are likely to escape conviction so long as they can assert the most casual acquaintance with her prior to the rape (even if they gain access to her home by deception!), but also that a prostitute can never be raped so long as the rapist did not "leap out of the bushes" at her. *See* BOURQUE, *supra* note 45, at 4-6 (describing the case of *People v. Zabuski* (Pasadena Super. Ct. 1986) (dismissing the jury after complainant testified she had agreed to perform oral copulation for $30, but defendant had then become "'extremely violent,' and forced her to engage in sexual intercourse and sodomy")).

48. Crenshaw, *supra* note 23, at 1251 n.35, 1271; Wriggins, *supra* note 23, at 120-21.

49. *See Seaboyer*, [1991] 2 S.C.R. at 651-52 (L'Heureux-Dube, J., dissenting).

50. *See* HALE, *supra* note 36, at 633.

51. *See Seaboyer*, [1991] 2 S.C.R. at 654 (L'Heureux-Dube, J., dissenting); BOURQUE, *supra* note 45, at 59 (noting that early studies of and information about rapists used to develop and support distinct psychological portraits of rapists were derived from statistics or studies involving incarcerated rapists). *But see id.* at 71-72 (noting that a number of studies have involved successful newspaper or magazine ad solicitation of self-identified unconvicted rapists); Check & Malamuth, *supra* note 26, at 351 (30 percent of all male college students and 44 percent of "high sex role stereotyping" male college students indicated some likelihood of committing date-or acquaintance-rape if they could be assured that no one would know); Mary P. Koss & Kenneth E. Leonard, *Sexually Aggressive Men, in* PORNOGRAPHY & SEXUAL AGGRESSION (Malamuth & Donnerstein eds., 1984), *cited in* Scully & Marolla, *supra* note 26, at 251 (85 percent of college men defined as highly sexually aggressive had victimized women with whom they were romantically involved); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1022-24 (1991).

52. *See* FEILD & BIENEN, *supra* note 26, at 32. In other words, this stereotype reflects the idea that if a woman consents to have intercourse with a man once, she will always consent again. This amounts to saying that a woman's consent to intercourse with a man extends indefinitely into the future regardless of future circumstances or changes in their relationship. Compare the concept of consent implicit in the marital rape exception, *infra* notes 140-46 and the accompanying text. *But see* James V.P. Check & Neil M. Malamuth, *Pornography Effects and Self-Reported Likelihood of Committing Acquaintance v. Stranger*

12. If a woman has ever consented to have extramarital sex, she cannot be trusted to tell the truth.[53]

13. If a woman has a "bad character," she probably is willing to engage in extramarital sex indiscriminately and cannot be trusted to tell the truth.[54]

14. Women, or at least certain kinds of women, "deserve" to be raped.[55]

15. Women cry "rape" at the least provocation[56] and frequently fabricate charges of rape, either because they are filled with malice or spite toward the defendant, men in general, their husbands or past lovers, or because they consented to extramarital intercourse, got caught and want to escape feared punishment by parents, husbands or lovers.[57]

16. Even when a woman is not consciously lying about having been raped, the rape may exist only in her fantasy.[58]

17. Nonconsensual intercourse is, in the absence of extreme force, merely an act of sex.[59]

Rape, Paper Presented Before Midwestern Psychological Assoc., Minneapolis (May 1982) (laboratory study indicates that acquaintance rape is a significantly more likely occurrence than stranger rape) *cited in* Check & Malamuth, *supra note 26*, at 353; FEILD & BIENEN, *supra note 26*, at 76 (significant proportion of reported rapes involve an assailant known to the victim); Scully & Marolla, *supra note 26*, at 251.

53. *See infra* notes 203-214 and accompanying text.

54. *See Seaboyer*, [1991] 2 S.C.R. at 652-53, 655 (L'Heureux-Dube, J., dissenting) (citing L. Clark & D. Lewis, *A Study of Rape in Canada: Phases 'C' and 'D'*, Report to the Donner Foundation of Canada (1976)).

55. *See* BOURQUE, *supra* note 45, at 68; Scully & Marolla, *supra* note 26, at 257-58.

56. *See* Henderson, *supra* note 25, at 227.

57. *See Seaboyer*, [1991] 2 S.C.R. at 653 (L'Heureux-Dube, J., dissenting); Henderson, *supra* note 25, at 227 ("women are lying, scheming, castrating bitches").

In fact, rape victims do not appear to lie any more frequently than victims of other violent crimes, L. Curtis, *Victim Precipitation and Violent Crime*, 21 SOC. PROB. 594 (1974), *cited in* FEILD & BIENEN, *supra* note 26, at 46, and crime statistics indicate that rape has always been a seriously underreported crime, FEDERAL BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, UNIFORM CRIME REPORTS OF THE UNITED STATES (1975) [hereinafter UNIFORM CRIME REPORT]. *Cf.* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit:'" A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993).

58. *See Seaboyer*, [1991] 2 S.C.R. at 654 (L'Heureux-Dube, J., dissenting)(citing MARILYN G. STANLEY, THE EXPERIENCE OF THE RAPE VICTIM WITH THE CRIMINAL JUSTICE SYSTEM PRIOR TO BILL C-127, at 39-40 (Dep't Just. Ottawa 1985)).

59. According to some feminists, rape is an act of violence that has nothing to do with sex. This would seem to be as much a distortion as the proposition that rape is merely an act of sex. Rape clearly is an act of violence, always from the woman's point of view and often from the man's. *See* Scully & Marolla, *supra* note 26, at 255-57. It seems equally clear that rape is an act of sex in most, if not all, cases of acquaintance rape or date rape.

These stereotypes[60] present a male view of rape that appears to reify the male fear of consensual intercourse followed by a false allegation of rape and a jury's sympathetic response to that allegation. More fundamentally, these stereotypes reflect a confusion between coerced intercourse and consensual intercourse,[61] between "forcible rape," "true aggression," "reluctant submission" and "desired intimacy,"[62] and a difficulty in separating a man's own desire from the woman's desire or consent. The contradictions between some of the different stereotypes appear to derive from the mythical dual nature attributed to women by men: woman is virgin or whore, goddess or witch, earth mother or curse to "mankind."[63]

As recently as twenty years ago these myths or stereotypes were still generally subscribed to and impacted every aspect of the legal system's response to a rape allegation. While somewhat less prevalent today, their effect may still be felt at any stage of a complaint. Stereotypes continue to affect whether the police will believe a complainant or categorize her charge as "unfounded," whether the prosecutor will elect to proceed with the charge, whether a judge will issue a warrant, what evidence the judge will admit at trial, the defense lawyer's strategy and tactics,[64] the judge's instructions to the jury,[65] and the extent to which the jury follows those instructions or redefines elements of the law by ignoring them. Stereotypes affect how a woman's friends and acquaintances, perhaps even her husband, react to her account of

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Furthermore, studies of convicted rapists have shown that even stranger rape frequently involves high excitement, low risk sexual gratification for the rapist. *Id.* at 257-60; *see also* FEILD & BIENEN, *supra* note 26, at 52-53, Table 3-2, Item 19. *Cf.* Henderson, *supra* note 25, at 225 ("Rape *is* a form of soul murder.").

60. *See also* Martha R. Burt & Rochelle S. Albin, *Rape Myths, Rape Definitions and Probability of Conviction*, 11 J. APPLIED SOC. PSYCH. 212, 217 (1981); Neil M. Malamuth, *Rape Proclivity Among Males*, 37 J. SOC. ISSUES 138, 140-42 (1981); Vandervort, *supra* note 19, at 258 n.41, 260 n.54.

Torrey has summarized these classic rape myths into four categories. *See* Torrey, *supra* note 51, at 1025-31.

61. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1095 (1986); Henderson, *supra* note 25, at 225; CATHARINE A. MACKINNON, *Rape: On Coercion and Consent, in* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171, 175 (1989).

62. MODEL PENAL CODE § 213.1 cmt.2 (1980).

63. *Seaboyer*, [1991] 2 S.C.R. at 652 (L'Heureux-Dube, J., dissenting); *see* Henderson, *supra* note 25, at 227.

64. *See* Elizabeth A. Sheehy, *Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?*, 21 OTTAWA L. REV. 741, 774-75 (1989).

65. *See, e.g.*, *supra* note 38 and accompanying text.

the experience. Stereotypes may even lead the complainant to wonder in inappropriate as well as appropriate cases whether she could have avoided the attack.

A closer look at "unfounded charges" statistics is instructive. Until social scientists began to research the meaning of rape statistics in the 1980s, men's fears of false rape complaints were regularly reinforced by police statistics showing high rates of "false reports" of rape. The new research has shown that many of those older statistics were actually statistics of "unfounded charges" by police, i.e., those for which the police did not recommend prosecution.[66] The reasons the charges were considered "unfounded" varied as widely as the statistics, depending on who did the reporting and the criteria used. For example, in Denver in the late 1960s the unfounded charges rate for alleged rapes was twenty-five percent, because police considered all acquaintance rapes where the parties were believed to have had prior sexual relations to be seductions, and therefore classified all such rape claims as unfounded.[67] New York City had similar statistics until the city began requiring all reports on alleged rapes to be taken by female police officers. The rate of unfounded rape charges then dropped to two percent.[68]

In addition to influencing how actors in the criminal justice system react to a rape charge, there are a number of specific ways that male perspectives have shaped and continue to shape the content of the law of rape, the evidentiary rules that govern how a judge and jury will consider a charge of rape, and the application of evidentiary and other rules in specific cases.

C. How Perspective Shapes the Law

1. The Definition. —Just prior to the early 1970s, the law of rape in all common law jurisdictions was remarkably similar to that described by Lord Hale in the seventeenth century. The typical statute or court decision defined rape as "[t]he act of sexual intercourse[69] committed by a man with a woman not his wife and without her consent, committed when the woman's resistance is

66. *See* Torrey, *supra* note 51, at 1028-29.

67. KATZ & MAZUR, *supra* note 35, at 207-09.

68. *Id.*

69. The earliest phrase used was "carnal knowledge." BLACK'S LAW DICTIONARY 1427 (rev. 4th ed. 1968) (citing Gore v. State, 46 S.E. 671 (Ga. 1904)).

overcome by force or fear."[70] The interpretation of these definitions was generally quite uniform. In addition to proving at least some degree of penetration[71] and that the complainant was not married to the defendant, courts also required the prosecution to prove that the accused had used force or that the complainant either offered substantial resistance or failed to resist only because of reasonable fear for her safety, or both.[72] A complainant's reasonable fear for her safety tended to require proof of an explicit threat of force.[73] Courts also typically required a prompt complaint about the assault by the complainant,[74] and proof that the complainant was "chaste."[75] Many courts required the woman to resist to her utmost.[76] Words alone were not enough to indicate a lack of consent,[77] and some courts required the complainant's active resistance to "persist until the offense is consummated."[78] If the complainant's consent appeared to be merely "reluctant," defined as something less than what results from fear of serious injury or death, or consent arising only after a struggle, it was nevertheless valid consent constituting a complete defense to the rape charge.[79] The accused did not have to assert or defend his

70. BLACK'S LAW DICTIONARY 1260 (6th ed. 1990)(citing State v. Lora, 515 P.2d 1086, 1093 (Kan. 1973)).

71. *Id.*; HALE, *supra* note 36, at 628.

72. *See* M. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 341 (6th ed. 1995). Judges and commentators who approve of this objective standard for the kind or amount of fear that will justify a woman's failure to resist agree that in some circumstances, at least where the complainant was jumped from behind and a gun is pointed to her head, it is reasonable not to resist at all. *Id.*

73. Goldberg v. Maryland, 395 A.2d 1213, 1219-20 (Md. Ct. Spec. App. 1979).

74. State v. Ciskie, 751 P.2d 1165, 1171 (Wash. 1988). This doctrine also dates back to the seventeenth century. See HALE, *supra* note 36, at 633.

75. In all jurisdictions a victim's chastity was considered relevant to whether she had consented to act and/or whether her testimony should be considered credible. In addition, in a smaller number of jurisdictions chastity of the victim was an essential element of the statutory offense which the prosecution had to prove to the satisfaction of the jury. *See* 1A WIGMORE ON EVIDENCE § 62 n.10 (Tillers rev. 1983).

76. *E.g.*, State v. Cottengim, 12 S.W.2d 53, 57 (Mo. 1934); MODEL PENAL CODE § 213.1 cmt. 4 n.86 (1980).

77. *E.g.*, Welch v. State, 198 S.E. 810, 811 (Ga. App. 1938); *Goldberg*, 395 A.2d 1213; Selvage v. State, 27 N.W.2d 636, 637 (Neb. 1947); Brown v. State, 106 N.W. 536, 539 (Wis. 1906).

78. *Brown*, 106 N.W. at 538; *see Selvage*, 27 N.W.2d at 637.

79. *See Welch*, 198 S.E. at 811; *Goldberg*, 395 A.2d 1213.

own chastity since this was deemed to be irrelevant to his credibility[80] and prejudicial to the question of his innocence.

2. Nonconsent, Resistance and Force. —A statutory definition of rape may include one, two or all of the elements of nonconsent, resistance and force. However, regardless of the formal terms of the definition, the close interrelationship of the three elements, both theoretically and practically, brings forth much of the same dynamic. In the past that dynamic has been strongly shaped by the perspective of the accused, a distinctly male point of view, to the exclusion of the complainant's, i.e. female, perspective.

a. Consent. —The inclusion of the element of nonconsent in the definition of rape appears to be essential. What, after all, is rape but nonconsensual intercourse? As an element of the crime, nonconsent must be proved by the prosecution. At the beginning of the prosecution's case, doubts about the woman's credibility, especially with regard to her sexual relations with a man she knows, were crucial. Lord Hale's admonition that a rape accusation is even harder to defend than to prove seems to have resonated in male rape fantasy-fears in which the testimony of a woman and a man are pitted against each other with no extrinsic evidence to support or disprove either side. Of course, the prosecutor still carries the burden of proof in such situations, and the proof required must be "beyond a reasonable doubt." These general protections of the criminal justice system were perceived to be inadequate. The woman's lack of consent needed to be confirmed, and her resistance was seen as a possible source of such confirmation.

The requirement for confirmatory evidence of a woman's nonconsent also reflects men's fantasies of women's fantasies, specifically the belief that women wish to be seduced because society constrains them from requesting directly, and perhaps even from recognizing within themselves a desire for, sexual contact.[81]

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80. *See, e.g.*, State v. Sibley, 33 S.W. 167, 171 (Mo. 1895) (Burgess, J.) ("It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman."). *Contra id.* (Gantt, J., dissenting).

81. *See* Power v. State, 30 P.2d 1059, 1060 (Ariz. 1934); Davis v. State, 48 S.E. 180, 181 (Ga. 1904); State v. Anderson, 137 N.W.2d 781, 783 (Minn. 1965); State v. Wulff, 260 N.W. 515, 516 (Minn. 1935).

An often cited and influential student note appeared in the *Yale Law Journal* in 1952.[82] This note tackled head-on the question of what women want:

> Relying on Freud, the author points out that it is not simply that women lie, although there is an "unusual inducement to malicious or psychopathic accusation inherent in the sexual nature of the crime." Even the "normal girl" is a confused and ambivalent character when it comes to sex with men she knows. Her behavior is not always an accurate guide to her true desires, for it may suggest resistance when in fact the woman is enjoying the physical struggle:
>
> > When her behavior looks like resistance although her attitude is one of consent, injustice may be done the man by the woman's subsequent accusation. Many women, for example, require as a part of preliminary 'love play' aggressive overtures by the man. Often their erotic pleasure may be enhanced by, or even depend upon, an accompanying physical struggle. The 'love bite' is a common, if mild, sign of the aggressive component in the sex act. And the tangible signs of struggle may survive to support a subsequent accusation by the woman.
>
> And if a woman is ambivalent about sex, it follows that it would be unfair to punish the man who was not acting *entirely* against her wish.
>
> > [A] woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feeling which might arise after willing participation . . . Where such an attitude of ambivalence exists, the woman may, nonetheless, exhibit behavior which would lead the fact finder to conclude that she opposed the act. To illustrate . . . the anxiety resulting from this conflict of needs may cause her to flee from the situation of discomfort, either physically by running away, or symbolically be retreating to such infantile behavior as crying.[83]

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82. *See generally* Dworkin, *supra* note 42. As Estrich observes, this Note is cited, with apparent influence, in connection with the MODEL PENAL CODE provisions adopted in 1955 and also in the comments to them edited in the 1970s and published in 1980. ESTRICH, *supra* note 25, at 121 n.42. *See* MODEL PENAL CODE, § 213.1 (Tentative Draft No. 4, 1955).

83. ESTRICH, *supra* note 25, at 39 (quoting Dworkin, *supra* note 42, at 66-68).

This belief system is also reflected in a student note published in the 1966 *Stanford Law Review*:

> "Although a woman may desire sexual intercourse, it is customary for her to say, 'no, no, no' (although meaning 'yes, yes, yes') and to expect the male to be the aggressor. . . . It is always difficult in rape cases to determine whether the female really meant 'no'. . . ."
>
> The problem of determining what the female "really meant" is compounded when, in fact, the female had no clearly determined attitude—that is, her attitude was one of ambivalence. Slovenko explains that often a woman faces a "trilemma"; she is faced with a choice among being a prude, a tease, or an "easy lay." Furthermore a woman may note a man's brutal nature and be attracted to him rather than repulsed. Masochistic tendencies seem to lead *many* women to seek men who will ill-treat them sexually.[84]

b. Resistance. —Ideally a woman's resistance should confirm her nonconsent. But since a demure or conflicted woman who wished to be seduced without blame was expected to offer some degree of token resistance, her claim of resistance also needed confirmation. The *extent* to which she resisted or failed to resist was adopted as a *measure* of a complainant's nonconsent. In contrast to the former credibility battle, the requirement of resistance provided a source of extrinsic evidence. If the complainant exhibited bruises or other marks of force or struggle, then her testimony of coercion was considered reliable.[85]

The next step was an inference that "resistance" actually means *utmost* resistance. This inference is closely akin to the doctrine which posits that "mere words" do not suffice to give the defendant notice of the complainant's nonconsent. Both doctrines relate to the stereotypes that generally women want sexual intercourse (and so would presumably offer only token resistance to most men), and that a woman will say "no" to sexual intercourse when she means "yes" because, consciously or unconsciously, she wishes to be seduced. The stereotypes behind these doctrines were supported by many conflicting societal mores, theological tenets of

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84. *The Resistance Standard in Rape Legislation, supra* note 42, at 682 (quoting Ralph Slovenko, *A Panoramic Overview: Sexual Behavior and the Law,* in SEXUAL BEHAVIOR AND THE LAW 5, 51 (Ralph Slovenko ed., 1965)(emphasis added)).

85. *See* ESTRICH, *supra* note 25, at 29.

religious institutions and theories of Freudian psychology. The important issues are what were the source of these values,[86] and whether these values have shaped the law in ways which are inconsistent with the law's most basic goals of justice and protection for the greatest number of members of society.

The requirement of utmost resistance manifests a lack of concern about whether the law should encourage women to engage in strenuous physical resistance to a sex attack, conduct that is likely to result in her serious injury. In fact, advice given by police, law and order groups, and others for many years conflicted on whether it was to a woman's advantage or disadvantage to resist an attacker strenuously.[87] Some recent research indicates that rape victims who physically resist and combine their resistance with one or more other strategies are indeed more likely to escape an attempted rape.[88] However, other recent research indicates persuasively that those rape victims who attempt physical resistance to sexual attacks are significantly more likely to be injured than those who do not.[89] A woman making an assessment, often within a few seconds and always under extreme stress, about whether physical resistance is more likely to result in escape or serious injury should be excused if she concludes that something less than utmost resistance might yield the greatest benefit. Until recently, however, courts simply did not address this issue, and many assumed that a lack of serious injury provided strong evidence of consent.[90]

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86. For example, the church is a patriarchal institution, and neither the seventeenth nor the nineteenth centuries were receptive to women's sexuality or strength. This general lack of receptivity is well exemplified by the female monarchs of England during this period—Elizabeth, who was notable as being a unique example of a strong female ruler and who never married and encouraged a myth of virginity in order to maintain her power; Mary, whose husband, William of Orange, effectively wielded the power of the throne even though the succession had passed to her; and Victoria, who deferred to her husband during his life and cultivated an image of domesticity throughout her long reign.

87. Many police officers have long suggested that apparent compliance or efforts to distract an assailant will often be more effective in avoiding injury to a woman. JEANNE C. MARSH ET AL., RAPE AND THE LIMITS OF LAW REFORM 21-22 (1982).

88. BART & O'BRIEN, *supra* note 26, at 105.

89. KADISH ET AL., *supra* note 72, at 336 n.b.

90. *See, e.g.*, Sheehy, *supra* note 64, at 741 (quoting P. PATULLO, JUDGING WOMEN: A STUDY OF ATTITUDES THAT RULE OUR SYSTEM 20-21 (1983) (quoting J. David Wild, Cambridge Crown Court, 1982 ("If a woman does not want [to be raped] she has only to keep her legs shut and she would not get it without force and there would be marks of force being used."))).

Recent social science research shows that only twelve percent of rape victims attempt physical resistance to a sexual attack.[91] The Revised Comments to the Model Penal Code observe that a woman may "quite rationally decide[] to 'consent' rather than risk being killed or injured."[92] But equally rational behavior, such as pleading with a threatening rapist to use a condom to prevent the possible transmission of HIV, has occasionally clouded the issue of consent for a grand jury and prevented indictment.[93]

The utmost resistance doctrine has resulted in what Professor Estrich calls an uncodified "reasonable victim" standard for assessing the complainant's behavior.[94] Many courts have disregarded a complainant's claim that she did not consent to the intercourse unless the complainant could prove that she had exhibited the resistance of "one who does not scare easily, one who does not feel vulnerable, one who is not passive, one who fights

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91. KADISH ET AL,, *supra* note 72, at 336 n.b. In 1985 Pauline Bart and Patricia O'Brien published their study of ninety-four women who had been attacked and either had avoided being raped or had been raped. After noting the relatively small number of women who had used physical force to resist their attacker, the authors warned, "the groups of women who spoke to us were obviously those who had survived attacks, and were not permanently, totally, or nearly totally incapacitated. The women whose horrible deaths are reported with relish in lurid media accounts are not in our sample." BART & O'BRIEN, *supra* note 26, at 105.

92. MODEL PENAL CODE § 213.1 cmt. 4 (1980).

93. *No Bill in Rape Case Prompts Outrage; Suspect Wore a Condom at Woman's Request,* HOUS. CHRON., Oct. 10, 1992, at A30. Later one of the grand jurors told a local television station that several of the jurors believed the woman's request (to put on a condom to prevent the transmission of AIDS) to the intruder, who was brandishing a knife, "suggested willing participation." *Man Is Convicted of Rape in Case Involving Condom,* N.Y. TIMES, May 14, 1993, at A12. Following a public outcry, which included public demonstrations by Austin women, the district attorney sought and obtained an indictment from a second grand jury. Christy Hope, *Rapist Gets 40 Years: Consent Defense in Condom Case Unsuccessful,* DALLAS MORNING NEWS, May 15, 1993, at A33. Other rape defendants have not been successful with the "condom means Consent" defense. Cindy Loose & Patrice Gaines, *Condom Doesn't Mean Consent, Jury Says,* WASH. POST, July 14, 1993, at C3.

However, the increasing use of condoms by rapists to avoid not only sexually transmitted diseases but also genetic identification is hampering rape prosecutions nationally because the lack of semen eliminates corroborating evidence that is still considered essential by many juries. Scott Ladd, *Attackers Using Condoms: Wary of AIDS, Court's Use of Genetic IDs,* NEWSDAY, Jan. 7, 1990, at 5; Craig Wolff, *Rapists and Condoms: Is Use a Cavalier Act or a Way to Avoid Disease and Arrest?,* N.Y. TIMES, Aug. 22, 1994, at B1 (rape crisis clients report condom use in 15-20% of incidents in some areas).

Cf. Mary Anne Bobinski, *Women and HIV: A Gender-Based Analysis of a Disease and Its Legal Regulation,* 3 TEX. J. WOMEN & L. 7, 43-45 n.155 (1994) (discussing the difficulties in tort actions by women for HIV transmission when consent defenses are asserted because of male-female power imbalances in many relationships).

94. ESTRICH, supra note 25, at 65.

back, not cries."[95] This "reasonable victim" is clearly based on a male victim model—admittedly the model best known to the male judges and lawyers who formulated it, but not a model appropriate for a class of victims almost entirely female.[96]

It is telling that no such "reasonable victim" standard applies to other violent crimes such as murder or assault.[97] Nor is this "reasonable victim" standard equivalent to the long sought recognition that a reasonable woman might assess certain potentially tortious behavior differently than the reasonable man accused of such behavior.[98] This is a standard developed by men from the perspective of men and then imposed on female victims without regard to whether most women actually conform to the standard.

In addition, the "notice" that nonconsenting sexual assault victims are required to give—resistance to the point of injury or fear of death or serious injury—is markedly different from the notice that is required of victims of other crimes for which consent is an absolute defense. For example, property owners may show nonconsent to trespass if they have given notice with "mere words" on a tree poster or in a verbal warning.[99] Similarly, defendants accused of robbery generally have been unsuccessful in claiming that their victims cooperated with the taking of their money or that they otherwise consented by making it easy for the accused. For a consent defense to succeed, the robber would have to show active

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95. *Id.* See also State v. Rusk, 424 A.2d 720, 733 (Md. Ct. App. 1981) (Cole, J., dissenting)("She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person. . . . She must make it plain that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride.").

96. Until quite recently, this was a wholly female class if only the prosecuted cases were considered.

97. Henderson, *supra* note 25, at 204.

98. Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991). Adopting a "reasonable woman" standard for the assessment of allegations of sexual harassment, the court stated:

> in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. . . . Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underling threat of violence that a woman may perceive.

Id. at 878-79 (internal citations omitted). *See generally* Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice,* 77 CORNELL L. REV. 1398 (1992); Carol Sanger, *The Reasonable Woman and the Ordinary Man,* 65 S. CAL. L. REV. 1411 (1992).

99. *See* ESTRICH, *supra* note 25, at 40, 121-22 nn.46-47.

collusion by the victim.[100] In contrast, as Estrich pointed out, only in a rape prosecution is "passive submission"[101] or "passive assent"[102] sufficient to constitute consent to the crime.

c. Force. —In an effort to reform rape laws by shifting the focus of rape trials from complainants to defendants, some jurisdictions have adopted definitions of rape that require a showing of force or violence or a threat of force or violence. In Michigan, for example, the legislature eliminated the element of consent, defining rape solely in terms of the type and amount of force used by the accused.[103] Certain types of behavior, for example the display of a weapon, are *per se* unlawfully coercive.[104] Yet the old tradition of requiring that the force used by a man be sufficient to have caused serious bodily injury to the complainant remains strong.[105] Even the Michigan law omits many instances of coerced sex not involving violence which women may well classify as rape. As applied, these requirements remain consistent with many of the old stereotypes—that women really want to be seduced, that they find some coercion acceptable, if not exciting, and that the law must incorporate precautions against rape charges that are fabricated after consensual intercourse (which, it is still presumed, is the only intercourse that would not have resulted in injury).[106]

Defining force to require injury, whether by statutory definition or application, means that if a woman submits to sexual intercourse out of fear because of an implicit threat of force (for example, when she is cornered by a man who is significantly larger or stronger than she), then there will be no rape conviction if the aggressor does not verbalize any specific threat and denies that he would have seriously harmed the complainant if she had failed to submit. Yet, this approach is simply a different means of imposing the requirement of strong physical resistance on the complainant. The requirement forces a woman to make the choice between rape accompanied by serious injury or rape without serious injury which

100. *See* ESTRICH, *supra* note 25, at 40-41, 122 n.48.
101. State v. Neely, 300 P. 561 (Mont. 1931).
102. State v. Natalle, 135 So. 34 (La. 1931).
103. 39 MICH. COMP. LAWS ANN. § 750.520(b)(1)(a)-(f)(West 1991).
104. *Id.*
105. *See* ESTRICH, *supra* note 25, at 86-87.
106. As to the effects of various attempts at rape reform, *see* Chamallas, *supra* note 27, at 799-800.

leaves her to live, often in the same neighborhood, with an unpunished, unchastened attacker.

This difficulty is also directly implicated by the doctrine which posits that "*reluctant* consent" received from a woman only after the use of "some force,"[107] is nevertheless legally valid consent. Such coerced consent would not be valid consent for any other purpose in criminal or tort law.[108]

d. Overall Effect of the Doctrines. —As we have seen, requirements for force used by the defendant and resistance by and injury to the complainant all have been used as proxies for the element of nonconsent.[109] As proxies, they are merely evidence, not true measures, of the *complainant's* state of mind. This emphasis is contrary to the usual focus in criminal law on the *defendant's* state of mind.

It is possible to theorize that, if a man has the worst possible attitude, but a woman still wants intercourse with him for some reason, perhaps as self-punishment, then no criminal harm has occurred. One might then say that it is not unjust to punish the accused, but in the absence of criminal harm there is no crime in fact, or perhaps there is an "attempted rape" at most. In such a case, focusing on the woman's state of mind to the exclusion of the man's would seem to be an appropriate approach. One might dismiss this case as simply an extreme hypothetical, unlikely to be realized except in the rarest case.[110] Or one could interpret it as another version of the old myths that women want forced sexual contact or do not know what they want, or that they want contradictory things at the same time.[111]

The underlying policy problem is that the doctrines of nonconsent, resistance and force have functioned to help men obtain what they want from women, however much lip service the male establishment has given to female chastity and virginity. These doctrines do not aid women in protecting their freedom of

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107. Welch v. State, 198 S.E. 810, 811 (Ga. App. 1938).

108. *See, e.g.,* MODEL PENAL CODE § 2.11(3)(d)(1980) (consent is not valid if it results from coercion). *Cf.* RESTATEMENT (SECOND) OF TORTS § 892B cmt. j (1977) (consent under duress invalid).

109. *See* ESTRICH, *supra* note 25, at 22, 29, 52 (force and nonconsent are substitutes for the traditional *mens rea* requirement).

110. After all, the woman who had desired the sexual contact as self-punishment would have had to change her mind sufficiently to prosecute.

111. *See supra* text accompanying notes 41-42.

choice,[112] much less their emotional and physical integrity. The police and prosecutorial biases and rape trial verdicts that these doctrines produce encourage men to be coercive toward women from whom they want a primarily sexual relationship.[113] The effect of these doctrines, whether framed in terms of the complainant's resistance or the force used by the defendant, is to define acceptable consensual intercourse to include intercourse induced by a considerable degree of fear, coercion or intimidation.[114] Such a definition contradicts the usual definition of consent, whether it is consent in the context of an affirmative defense to a non-rape criminal charge[115] or consent in the context of harm to a property interest.[116] In these contexts consent is vitiated by duress, which does not require the use of force. Duress is defined as "a *threat* of unlawful conduct [such as assault, battery or imprisonment] that is intended to prevent and does prevent another from exercising free will and judgment in [her] conduct."[117] To call such conduct "seduction" must appear to a woman subject to such a threat, even when only implied, as an Orwellian use of language.[118]

None of these doctrines would appear necessary to protect innocent men from unfounded rape charges if an innocent man is defined as one who has sought a truly consensual relationship. Such a man will adapt to a change in the law that makes "no mean no."[119] Nor are these doctrines necessary to protect innocent defendants from patently false charges of rape. Without the

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112. MODEL PENAL CODE § 213.1 cmt. 4 (1980).

113. While male police and prosecutors have been shown to have their fair share of stereotypical attitudes, their behavior is also influenced by their desires to present or prosecute only "winnable" cases. Of course, this calls for conservative predictions about the verdicts that judges and juries will return.

114. Michele N-K Collison, *"A Sure-Fire Winner Is to Tell Her You Love Her; Women Fall for It All the Time": Men Talk Frankly With Counselor to Assess Harassment and Acquaintance Rape,* CHRON. OF HIGHER EDUC., Nov. 13, 1991, at A1 (showing how coercion and deception are tied together in aggressive attitudes).

115. *See* MODEL PENAL CODE § 2.11(1) (1980).

116. RESTATEMENT (SECOND) OF TORTS § 871 cmt. f (1977).

117. *Id.* (emphasis added).

118. *See* GEORGE ORWELL, 1984 (1949).

119. There may still be relationships in which a man desiring a truly consensual relationship and accepting that "no means no" is nevertheless mistaken about whether the woman is consenting. Reluctant consent to a relationship, much less sexual contact, can result when a woman feels trapped economically, is unwilling to risk separation from her children, or for other unfortunate reasons that truly have nothing to do with implicit force or violence. It seems doubtful that a woman who actually says "yes" to sexual intercourse in such situations is thereby raped. *See also* Coombs, *supra* note 27, at 311-12.

doctrines of force and resistance the question of whether the intercourse was consensual is still a question of fact for the jury to decide based on all of the evidence, including the credibility of both the defendant and the complainant.

Thus, the common law emphasis on the amount of resistance that the complainant exhibited or failed to exhibit seems to reflect a male perspective of rape. This emphasis has deflected attention from the defendant's coercive behavior, which is the appropriate focus in a trial where the purpose is to determine whether *his* actions were criminal.[120]

3. Mens Rea. —Traditionally, rape was considered to be a crime without a requirement of a *mens rea*.[121] While *mens rea* literally means the defendant's "mental state," legally it denotes the presence of a "guilty mind." In theory, rape was a strict liability offense; if a man employed force for the purpose of engaging in intercourse without the woman's consent, he would be guilty, regardless of whether he intended to commit rape.

The reality has been far different. In the first place, the most common defense offered—that the intercourse was consensual—was actually a claim about the intent of the accused as much as that of the complainant, even if this remained unstated. In addition, the legal system has encouraged courts to scrutinize the complainant's behavior as possible "provocation" of the assault. It has not been uncommon for a rape trial to focus more on the woman's behavior, and the light that her sexual history might shed on her motivation for engaging in certain behavior, than on what the accused did or did not do.[122]

As we have seen, this courtroom examination of the complainant's conduct is conducted essentially through male eyes. Thus, the viewpoint or "mental state" of the accused is in fact taken into

120. ESTRICH, *supra* note 25, at 29, 32; Henderson, *supra* note 25, at 207.

121. As noted earlier, Estrich maintains that the doctrines of nonconsent, resistance and force have served as substitutes for the *mens rea* usually required of a criminal defendant. *See* Henderson, *supra* note 25, at 211.

122. *See e.g.*, CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 17-20, 23, 24-26, 162-71 (1992). Admittedly, given the structure of the definition of rape, this preoccupation with the woman's conduct is to some extent necessary to determine whether the woman in fact consented to intercourse with the accused. The focus of this article is on the total effect of the system on female complainants and the extent to which that effect is attributable to unreasonable assumptions about women in general.

account even if it is not the conscious focus of the judicial system. The court's examination of the complainant's conduct becomes, in practice, a way of showing the absence of the defendant's "guilty mind."

If the male point of view was employed to examine the mental state of the accused directly, that would reflect society's general concern with preventing punishment of defendants who lack a "guilty mind." Applied to the woman's conduct, however, the male point of view objectifies the woman and denies the reality of her viewpoint.[123] This system also reinforces, and therefore encourages, the apparent implicit assumption that a man has a *right* to have sex with a woman whose appearance or behavior arouses him regardless of whether she says "no" or resists in some other way. The system resonates with the myths that "normal" men do not commit rape, and that rape is simply about sex. It fails to acknowledge the existence of a different reality for women[124] or to encourage men to understand, acknowledge or respond to that different reality.

A number of rape defendants have not only accepted this traditional mode of dealing with "mental state" but have also pushed it to the next logical conclusion, offering "mistaken belief in consent" as a defense. Thus, they argue that their belief was a mistake of fact; a mistake made in interpreting the complainant's behavior to mean that she had consented when, based on her testimony after the fact, she apparently had not consented.[125] Relying on the traditional meaning of *mens rea* as guilty intent, these defendants argue that, so long as they actually believed a woman had consented to have intercourse, then her actual behavior or protestations to the contrary and the amount of force used are irrelevant.[126] All commentators discussing this issue prior to 1986,[127] as well as the courts which have considered the issue,[128]

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123. *Cf.* Henderson, *supra* note 25, at 225 (the experience of being raped is the experience of "soul murder").

124. Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1104-05 (1987).

125. See, e.g., McQuirk v. State, 4 So. 775 (Ala. 1888). *Cf.* United States v. Short, 16 C.M.R. 11, 19 (C.M.A. 1954) ("[W]hether the woman's conduct was such as to lead the accused to believe she had consented to his acts" is a question for the military court, not for the accused's sole personal evaluation).

126. *See* State v. Crawford, 602 So.2d 952 (S.C. 1992).

127. See sources cited in Vandervort, *supra* note 19, at 236-37 n.4.

have likewise characterized it as a mistake of fact that vitiates the defendant's *mens rea*.[129]

In 1987 the *Canadian Journal of Women and Law* published a thorough reanalysis in the context of rape, by Lucinda Vandervort, of the Canadian doctrines of mistake of fact and mistake of law and their common law antecedents.[130] Vandervort argues that the analytic bind induced by the traditional characterization of this defense as a mistake of fact is unnecessary. She proposes that judges and prosecutors reinterpret the meaning of nonconsent and incorporate into its definition, as an element of the crime, the standard of conduct required by the law when a person confronts manifestations of possible nonconsent to sexual contact.[131] Thus, an element of sexual assault would be any action taken to coerce sexual contact when a person does not *explicitly* affirm her consent. Lack of such explicit affirmance of consent would be, *as a matter of law*, nonconsent. Vandervort points out that "[t]he primary function of positive law is to establish and enforce standards of conduct. Determinations of individual culpability are necessary as a means to achieve that end. Reliance on community standards to determine when legal standards may be enforced is counterproductive when the standards are in conflict."[132]

The recharacterization proposed by Vandervort would require no additional legislation in most jurisdictions. As a result of the recharacterization, a defendant's claim that he believed in good faith that the complainant had consented when she had not done or said anything to indicate affirmative consent would be a mistake

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128. *See, e.g., Seaboyer*, [1991] 2 S.C.R. at 613 (defendant's mistaken belief in complainant's consent need be honest, but need not be reasonable); Regina v. Tolson, [1989] 23 Q.B.D. 168, (Can. 1989); Vandervort, *supra* note 19, at 245 n.16.

129. Some commentators have pointed out that this rule encouraged men to ignore women's attempts to communicate their nonconsent, so that the existence of the defense in effect condoned sexual assault.

The mistake of fact defense first was used in statutory rape cases. In such a case, a defendant would be guilty if he claimed that he did not know the age below which rape became a strict liability offense. He would be protected if he claimed to have believed at the time that the girl he had raped was above the statutory age. *See, e.g.*, People v. Hernandez, 393 P.2d 673 (Cal. 1964).

130. Vandervort, *supra* note 19, *passim.*

131. *Id.*

132. *Id.* at 241 n.9.

of law, which is not a defense at common law,[133] in Canada[134] or in the United States.[135] This recharacterization, accompanied in each jurisdiction by publicity sufficient to provide the requisite notice to the jurisdiction's residents,[136] would at one stroke eliminate the contradiction now existing between the broader public policies proclaimed by the law and the troubling effects of the current interpretation of the mistaken consent defense.

There has, in the past, been an apparent general social acceptance of intercourse which results from a woman's "reluctant submission" to a man's nonviolent but coercive insistence. Although numerous jury verdicts indicate that much of society has accepted such situations in the past, it is not clear why this should dictate the applicable legal standard. The purpose of the law of rape is to "protect[] the female's freedom of choice and punish[] unwanted and coerced intimacy."[137] The purpose of the criminal law is to achieve justice for society as a whole, balancing each defendant's interest in receiving a full hearing under fair procedures and rules against the interest of society in deterring similar offenses. Judges and prosecutors should interpret the law to aid rather than to hinder these purposes. It is the current reluctance to define what is necessary to show consent as a matter of law and the continued characterization of contradictory testimony by the complainant and the accused (as to what she *meant* by her conduct) as a mistake of fact which perpetuates the use of "generally recognized social definitions [of rape] commonly used in the community."[138]

Nor has the idea that a woman's expression of consent must be affirmative (as if affirmative consent were inconsistent with soft music and the subtlety of romance) been whole-heartedly accepted.

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133. OLIVER W. HOLMES, JR., THE COMMON LAW 40-41 (M. Howe ed., MacMillan 1968)("Ignorance of the law is no excuse for breaking it. . . . [T]o admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.").

134. Vandervort, *supra* note 19, at 238 (citing CRIM. CODE CAN. R.S.C. c. C-34, § 19 (1995)).

135. State v. Woods, 179 A. 1 179 (Vt. 1935). *See* MODEL PENAL CODE § 2.04(1) § 2.04(3) (1980)(lack of knowledge or mistake about the law defining the offense is affirmative defense only if the statute or other enactment defining the offense has not been reasonably made public or the law provides that such ignorance or mistake constitutes an offense).

136. *See* MODEL PENAL CODE § 2.04(3)(a) (1980).

137. MODEL PENAL CODE § 213.1 cmt. 4 (1980).

138. Vandervort, *supra* note 19, at 253.

It is not so hard, however, to envisage a society in which intercourse does not occur until after one of the parties has murmured, "Let's make love. Wouldn't you like that?" and the other has actually said "yes."[139] Nor is it difficult to imagine a society in which even couples who have established a pattern of making love in certain circumstances are expected to manifest affirmative consent each time, even though nonverbal positive actions should then be sufficient.

4. Marital Rape. —At common law a man could not rape his own wife. The reason given by Lord Hale, and most subsequent commentators, was that a wife consented to all sexual intercourse with her husband for the duration of their marriage.[140] Presumably this reason was based on the idea that the very purpose of marriage is to permit intercourse. Some commentators have also suggested that the exemption was initially based on the wife's lack of juridical standing as a separate person at common law.[141] Both lines of reasoning, and the exemption itself, are now discredited among most commentators and have been discarded in some jurisdictions.[142] However, most American jurisdictions still retain some form of the marital rape exemption,[143] even when it is no longer logically related to the offense.[144] A number of jurisdictions have extended the spousal exemption to include cohabitants, which is at least consistent with the consent justification for

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139. *See* Lucy Reed Harris, *Towards a Consent Standard in the Law of Rape,* 43 U. CHI. L. REV. 613 (1976).

140. HALE, *supra* note 36, at 629 ("[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."). *See also* People v. Liberta, 474 N.E.2d 567, 572-73 (N.Y. Ct. App. 1984), and authorities cited therein. In *Liberta*, the New York Court of Appeals noted that "[i]nterestingly, Hale's statement of [the marital exemption] has not been fully accepted in England." *Id.* at 572 n.4 (citation omitted).

141. *Cf. Liberta*, 474 N.E.2d at 573 (citing 1 BLACKSTONE'S COMMENTARIES 430 (1966)).

142. *Liberta*, 474 N.E.2d 567; FEILD & BIENEN, *supra* note 26, at 163-66; West, *supra* note 27, at 46. *See generally* DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (1985); DIANA E.H. RUSSELL, RAPE IN MARRIAGE (1990).

143. West, *supra* note 27, at 46. Many of these states no longer protect a husband if the couple lives apart under a decree of separation, or if one of the spouses has filed for separate maintenance or divorce. See N.Y. PENAL LAW § 130.10 (McKinney 1988); MICH. COMP. LAWS § 750.520l (1975).

144. *See, e.g.,* MICH. COMP. LAWS § 750.520b to .520e (1975) (This law which became effective April 1, 1975, omitted terms or concepts of consent, yet retained the spousal exception in the sexual conduct statute).

the marital exemption.[145] More startlingly, a few jurisdictions have extended the spousal exemption to *formerly* married persons.[146] Neither traditional justification for the spousal exemption explains this extension, but the stereotypes which suggest that if a woman has consented before, she will always consent again, that women can only be raped by strangers, and that women really enjoy rape, do appear to explain it.

5. Prompt Complaint. —For centuries it was "assumed" that women "naturally" report rapes as soon as possible.[147] This assumption failed to account for evidence from women themselves that there were numerous reasons why women do not report rape promptly,[148] including the shame attached to any sexual activity outside of marriage, society's propensity to blame the victim for provoking the assault by her behavior or appearance,[149] a desire to forget about the traumatic experience,[150] fear of public probing into her prior sexual history,[151] and fear of retribution from a known assailant who has already shown his willingness to resort to violence or other coercion.[152]

Lord Hale, and many of his followers, believed that a court and jury should draw a strong inference of false or feigned testimony if a rape complainant "made no outcry" at the time of

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145. West, *supra* note 27, at 48, n.11; *see also* HALE, *supra* note 36, at 628.

146. West, *supra* note 27, at 46-48, nn. 1, 5-11; *see also* FEILD & BIENEN, *supra* note 26, at 164-66, 194-96.

147. 4 WIGMORE ON EVIDENCE § 1135 (Chadbourn rev. 1972).

148. *Cf.* Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth,* 37 N.Y.L. SCH. L. REV. 123 (1992) (noting that the delay by victims of domestic violence in reporting abuse is consistently interpreted within legal system as an indication of slight credibility).

149. MARSH ET AL., *supra* note 87, at 89.

150. *Id.* at 26.

151. *Id.* at 77. One Michigan prosecutor interviewed by the authors asserted that only after enactment of the state's rape victim shield statute would "a married woman [who] sees herself as respectable, but . . . may have a skeleton in [her] closet . . . bring charges." *Id.*

152. Dr. Pauline Bart, co-author of STOPPING RAPE: SUCCESSFUL SURVIVAL STRATEGIES, *supra* note 26, and numerous other studies of rape victims and their assailants, abandoned plans in 1990 to conduct a study of men accused of sexual assault by women admitted to a South Side Chicago hospital emergency room for treatment because none of the women would cooperate. All of the women that she spoke with were afraid of retaliation by their attackers, almost all of whom lived in the same neighborhoods with, and were known to, their victims. Interview with Pauline Bart, Professor of Sociology, University of Illinois in Chicago, in New York, N.Y. (Nov. 16, 1991). *See also* MARSH ET AL., *supra* note 87, at 26, 89.

the alleged assault or as soon thereafter as possible.[153] More recently, some jurisdictions have required the prosecution to prove that the complainant reported the rape to the police within a specific time, such as three or six months, following the alleged attack. Hence, the "recent complaint" requirement functioned as a short statute of limitations.[154]

The original doctrine of prompt complaint is an example of special evidentiary rules, applicable only in rape cases, which are at odds with the evidentiary principles developed to protect the integrity of the trial process. Requiring a prompt complaint is contrary to the general rule that prior consistent statements are inadmissible to prove the truth of the matter asserted[155] and that witness assertions "are to be regarded in general as true until there is some particular reason for impeaching them as false."[156] Generally, it is only after a witness' testimony is impeached upon cross-examination that prior consistent statements, such as prompt complaints to the police following an alleged rape, become admissible, and then solely to rehabilitate the credibility of the witness' primary testimony not for the purpose of proving the truth of that testimony.[157]

Thus, under the usual rule, a complaining witness normally would not be *permitted* to testify that she had made an immediate complaint to the police unless the defendant had first *presented evidence* to the jury that no rape had occurred. In common law rape trials, however, the courts required the trier of fact to draw an adverse inference regarding the complainant's credibility from either the absence of a recent complaint or its inadmissibility without regard to whether her credibility had been impeached.[158]

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153. HALE, *supra* note 36, at 633. *See also* MODEL PENAL CODE § 213.6(4) cmt. 5 (1980).

154. *E.g.*, MODEL PENAL CODE § 213.6(4); § 213.6(4) cmt. 5 (1980).

155. *See* MCCORMICK ON EVIDENCE § 250 (John W. Strong ed., 4th ed. 1992). Out-of-court statements offered to prove the truth of the matter asserted are generally defined as "hearsay," and are admissible evidence only under specific exception to the general exclusionary rule. *Id.* § 246. Such a prior consistent statement would be deemed hearsay unless the offer of proof were specifically made for some purpose other than to prove the truth of the matter asserted. *Id.* § 249. Such statements were also considered unreliable because they were "self-serving." *Seaboyer*, [1991] 2 S.C.R. at 668 (L'Heureux-Dube, J., dissenting).

156. *Seaboyer*, [1991] 2 S.C.R. at 668 (L'Heureux-Dube, J., dissenting)(quoting CROSS ON EVIDENCE (7th ed. 1990)).

157. *See* MCCORMICK ON EVIDENCE, *supra* note 155, § 47.

158. *See* 3A WIGMORE ON EVIDENCE § 924a (Chadbourn rev. 1970), and cases collected therein; 3 WIGMORE ON EVIDENCE § 924a (3d ed. 1940) and cases collected therein.

However, in some jurisdictions other rules restricted the admissibility of the prosecutor's evidence of the complainant's prior complaint.[159] When admissible, the prosecution's evidence was not admitted to show the truth of the complainant's testimony about the rape, but only to show that her testimony was consistent with the prompt complaint required by law.[160] This limitation is consistent with the general rules of hearsay admissibility as outlined above.

Like the doctrines that "mere words" are not enough to indicate nonconsent and that reluctant consent is good consent, the traditional prompt complaint requirement has in practice helped men gain sexual access to more women (i.e., women who do not wish to grant that access but can be coerced into granting it and then shamed into silence) rather than helping women protect the privacy and integrity of their own bodies and psyches.[161] Nor has the prompt complaint doctrine helped insure that sexual intercourse is indeed consented to by both parties, as legal theory and social mores ostensibly require.

6. Corroboration Requirement. —The corroboration rule for rape complainants was another exception to traditional rules of evidence. Generally, "the court may act upon the uncorroborated testimony of one witness, and such requirements as there are concerning a plurality of witnesses, or some other confirmation of individual testimony are exceptional."[162] The standard exceptions have long been children of tender years, accomplices and rape complainants, all of whom were thought to be especially unreliable as witnesses.[163] The reliability of children of tender years was apparently doubted because of questions about capacity, and that of accomplices doubted because of conflicts of interests created by their complicity in the crime that the defendant is accused of committing. That rape complainants are included in this list seems best explained by the stereotypical concerns with women's "complicity" in rape and fabricated rape charges.

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159. *Seaboyer*, [1991] 2 S.C.R. at 668 (L'Heureux-Dube, J., dissenting).

160. *Id.*

161. *See generally* Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993)(discussing sexual violation as an aspect of women's subordination).

162. *Seaboyer*, [1991] 2 S.C.R. at 668 (L'Heureux-Dube, J., dissenting) (quoting CROSS ON EVIDENCE 224 (7th ed. 1990)).

163. *Id.*

7. Prior Sexual History and Relevance. —Prior sexual history of a rape complainant should be considered "character evidence" since its predominant effect is to impugn the complainant's character.[164] Under established rules of evidence, support for a fact is not admissible for any purpose unless it is shown to be relevant to the proposition sought to be established.[165] Traditionally there are several overlapping ways to establish relevance between proffered evidence and the fact to be established: (1) showing a connection that "accords with common sense";[166] (2) showing a probable connection in common experience;[167] and (3) showing that the evidence is "logically probative" of the fact to be established, i.e., it makes that fact more or less probable than it would be without the evidence.[168]

At common law evidence of the complainant's prior sexual history (or "unchasteness") with respect to both the defendant and other men was admissible for the purpose of showing both the woman's consent and her lack of credibility.[169] In fact, however, there is no real connection between prior sexual conduct and either consent or credibility, as shown below. The assumption that the complainant's prior sexual history is relevant for these two purposes relies on one or more of the assumptions or stereotypes listed above, mainly that "unchaste" women consent to intercourse indiscriminately and that "unchaste" women lie.[170] In particular, these stereotypes assume that women with a history of prior extramarital sexual relations are neither nice nor truthful. Whatever may have been the accuracy of these assumptions two hundred or one hundred years ago,[171] social science research since

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164. *See infra* note 179 and accompanying text.

165. *See, e.g.*, FED. R. EVID. 401, 402.

166. *Seaboyer*, [1991] 2 S.C.R. at 679 (L'Heureux-Dube, J., dissenting).

167. FED. R. EVID. 401; *see also* MCCORMICK ON EVIDENCE, *supra* note 155, § 185 (whether evidence is relevant ordinarily lies "in the judge's own experience, his general knowledge, and his understanding of human conduct and motivation"); Abraham P. Ordover, *Admissability of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 105-08 (1977).

168. *Seaboyer*, [1991] 2 S.C.R. at 679 (L'Heureux-Dube, J., dissenting).

169. Such evidence was deemed relevant even if the accused had been unaware of the complainant's prior sexual history, making it clear that the relevance pertained to the truth of her complaint, not to the defendant's state of mind.

170. *Seaboyer*, [1991] 2 S.C.R. at 679 (L'Heureux-Dube, J., dissenting).

171. This is not to imply that these stereotypes were accurate in the past. Yet current social science research cannot tell us whether they were accurate in the past and, in any case,

the mid-1960s and the actual conduct of the general population in the United States and Canada have certainly discredited these stereotypes for today. For example, a study of sexual behavior published in 1974 reported that 80 percent of all women engaged in sexual relations prior to marriage,[172] almost 80 percent of men believe that premarital sex is appropriate for unengaged women and over 80 percent of men accept it as appropriate for engaged women.[173] Yet, many legislators, judges and commentators have continued to assume that prior sexual history evidence is relevant at least to the issue of consent.[174]

In any event, not all relevant evidence is admissible under general evidentiary principles. Relevant evidence may be unreliable or too prejudicial to the truth-finding function of the judicial system or too likely to cause confusion of the issues. Thus, evidence which is logically relevant but highly prejudicial or likely to lead to jury confusion may *and sometimes should* be excluded under general evidentiary principles unless its probative value is particularly great.[175]

In the past two decades, research conducted in response to women's concerns has assessed actual jury verdicts and prospective jurors' reactions to hypothetical rape scenarios and cases. This research has established beyond cavil the highly prejudicial nature of prior sexual history evidence. For example, one study examined the impact that prior sexual history evidence, under three types of

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whether they were is irrelevant to the issue of whether they are appropriate to use as standards within the legal system today.

172. MORTON HUNT, SEXUAL BEHAVIOR IN THE 1970'S 150 (1974).

173. *Id.* at 116, Table 13.

174. *E.g.*, FED. R. EVID. 404(a)(2); *Seaboyer*, [1991] 2 S.C.R. at 612-21 (there is "no logical or practical link between a woman's sexual reputation and whether she is a truthful witness," but exclusion of prior sexual history evidence without permitting the judge to weigh its relevance to consent against possible prejudice is unconstitutional); Frederick Eisenbud, Comment, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflections of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403, 409 n.28 (1975).

The Model Penal Code does not address the issues raised by prior sexual history evidence. However, the Revised Comments to the Official Draft suggest that while the complainant's prior sexual history is relevant to the issue of consent, "[o]bviously, veracity and sexual restraint are not related in any dependable fashion." MODEL PENAL CODE § 213.1 cmt. 8(e) (1980).

175. CHARLES MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 438-40 (2d ed. 1972).

exclusionary rules, had on prospective jurors.[176] The study showed that only the most restrictive evidentiary rule curtailed the jury's inference of victim consent, enhanced the complainant's credibility and increased the likelihood of conviction.[177] Restriction of such evidence did not, however, increase the likelihood of conviction where the facts of the hypothetical case included prior close friendship between the defendant and complainant which was accompanied by physical affection.[178] Even prior to such research, however, defense lawyers have always exploited this prejudice. Indeed, as a member of the Canadian House of Commons testified during the 1975 debate to reform Canada's rape laws:

> The myth is that a "bad woman" is incapable of being raped. . . . We have to deal with the myth that the credibility of a "bad woman" is immediately in question. I was never sure what that phrase meant. As a lawyer, all I knew was that it was of benefit to hurl as much dirt as possible in the direction of such a woman, hoping that some of it would stick and that the jury would disbelieve what she said.[179]

8. Prior Sexual History and Consent. —The principle that logically relevant evidence which is either highly prejudicial or likely to lead to jury confusion should be excluded has been applied generally to exclude evidence of a criminal defendant's character or of his or her "propensity" to commit a certain crime. The Federal Rules of Evidence codified this common law rule in 1974: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion."[180] Such evidence may not be offered to suggest that a defendant acted in a specific

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176. The three types of evidentiary rules on which the study was based were: (1) no exclusion—all prior sexual history evidence admissible for any purpose; (2) general exclusion of third party prior sexual history unless the judge specifically determined the evidence to be material to a fact in issue; and (3) exclusion of most third party prior sexual history evidence because of the risk of prejudice, confusion of the issues or misleading the jury. Borgida & White, *supra* note 26, at 342.

177. *Id.* at 345-346.

178. *Id.* at 342.

179. House of Commons Debate (Nov. 19, 1975, at 9252)(statement of Mr. Jarvis) *quoted in* Seaboyer v. Queen, [1991] 2 S.C.R. 577, 694 (L'Heureux-Dube, J., dissenting)(emphasis omitted). *See also* Sheehy, *supra* note 64, at 774-75.

180. FED. R. EVID. § 404(a) (1974). *See also* MCCORMICK ON EVIDENCE, *supra* note 155, § 186.

way on an occasion other than the one for which the evidence is proffered.[181]

Yet, from the early common law through the Federal Rules of Evidence, special rules have permitted evidence of a complainant's "unchaste" character to prove her consent in a rape trial.[182] To justify this exception proponents analogize it to the exception allowing certain character evidence where a murder or assault defendant claims that the victim was the first aggressor. Still, under that exception, the defendant may only offer evidence that the victim has a "character of turbulence and violence."[183] The defendant is not permitted to offer evidence of specific past acts of violence.[184]

While a rape complainant is not the defendant and therefore protective rules adopted for the defendant are not necessarily appropriate, this general rule applies more broadly than simply with respect to criminal defendants' propensities to commit crimes. Experience has shown the same or even greater distorting prejudice to the prosecution's case if a complainant's prior sexual history is introduced. Concern with jury confusion and with prejudice that might prevent a fair, unbiased outcome are the same for both types of cases. Notwithstanding the criminal justice system's concern with protecting innocent defendants, a defendant is entitled only to a fair trial, not to a trial prejudiced in his or her favor.

One subcategory of prior sexual history evidence traditionally viewed as particularly relevant is the so-called "pattern of conduct evidence."[185] This is evidence that prior sexual activity of the complainant shows a pattern of conduct similar to the conduct alleged in the case at bar. Proponents suggest that the prior conduct is highly indicative of the fact that the complainant consented to the alleged sexual assault and that nonconsent is a

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181. FED. R. EVID. 404(a)(2); MCCORMICK ON EVIDENCE, *supra* note 155, §§ 188, 192 (even in civil cases where commission of a crime is in issue, evidence of character is barred for purpose of showing "how a person probably acted on a particular occasion"); Ordover, *supra* note 167, at 108; *see also* FED. R. EVID. 404(b), 404(b) advisory committee's note.

182. FED. R. EVID. 404(a)(2); 1 WIGMORE ON EVIDENCE § 62 (3d ed. 1940); Ordover, *supra* note 167, at 108-09;

183. MCCORMICK ON EVIDENCE, *supra* note 155, § 193.

184. *Id.*

185. Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade,* 70 MINN. L. REV. 763, 830-48 (1986); Ordover, *supra* note 167, at 115-18.

separate element of the crime.[186] In her dissent in *Seaboyer*, Madame Justice L'Heureux-Dube pointed out that such evidence is "nothing more than a prohibited propensity argument" which is "highly prejudicial to the integrity and fairness of the trial process."[187] As Madame Justice L'Heureux-Dube reasoned:

> Such arguments depend for their vitality on the notion that women consent to sex based upon such extraneous considerations as the location of the act, the race, age or profession of the alleged assaulter and/or considerations of the nature of the sexual act engaged in. Though it feels somewhat odd to have to state this next proposition explicitly, consent is to a person and not to a circumstance. The use of the words "pattern" and "similar fact" deny this reality. Such arguments are implicitly based upon the notion that women will, in the right circumstances, consent to anyone and, more fundamentally, that "unchaste" women have a propensity to consent. . . . In my view, the mythical bases of these arguments deny their relevance.[188]

Stated even more bluntly, the "propensity" and "pattern of conduct evidence" are both thinly disguised suggestions that a woman who has, even a few times, engaged in sex outside marriage must be a whore.

Another subcategory of prior sexual history evidence admitted to prove consent involves prior sexual relationships between the complainant and the defendant. Such evidence is still admissible under most post-reform statutes that generally bar prior sexual history evidence because most legislators still believe it is highly relevant to the question of the complainant's consent. Such laws thereby endorse the stereotypical attitude that if the defendant and complainant were acquainted prior to the encounter, the complain-

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186. MCCORMICK *supra* note 155, at §§ 186, 190 (character evidence generally is not admissible except when character is in issue or when it is relevant to prove something more specific than that a person has acted in conformity with their past behavior). As we shall see, since the 1970's prior sexual history is generally excluded in most states under so-called "rape shield" laws, which require a showing of special necessity.

187. *Seaboyer*, [1991] 2 S.C.R. at 685 (L'Heureux-Dube, J., dissenting).

188. *Id.* at 685-86. *See also* Kearse v. State, 88 S.W. 363, 364 (Tex. Ct. App. 1905) (testimony by defense witness that he had kissed the complainant was properly excluded because "the fact [she] may have kissed the witness . . . would be no argument that she would kiss appellant"). *But see* KENT GREENAWALT, LAW AND OBJECTIVITY (1992) (a pattern of behavior does rationally affect our *view* of probabilities, even if actual probabilities do not change).

ant was more likely to have consented than not.[189] As noted above, Madame Justice L'Heureux-Dube has observed that "consent is to a person and not to a circumstance."[190] One might also observe that consent is to a person in the context of a relationship as it exists at a particular point in time, and not to that person forever and under all circumstances.[191] As expressed in the Revised Comments to the Model Penal Code: "[O]f course, a woman's freedom of choice is hers to exercise from time to time as she thinks fit."[192]

9. Prior Sexual History and Credibility. —The final area of evidentiary doctrine that has struck many women lawyers and other advocates for rape victims as unbalanced and prejudicial is the use of evidence of the complainant's prior sexual history to impeach her credibility at trial.[193]

In the English common law tradition, counsel was permitted to inquire, for purposes of impeaching a witness' credibility, into the personal history and conduct tending to discredit the character of the witness so long as it had not provided the basis for a criminal conviction.[194] This rule was frequently disputed in the United States, with widely varying results, but most American courts came to limit cross-examination attacking character "to acts which have a significant relation to the credibility of the witness."[195] The Federal Rules of Evidence takes this approach.[196] Conduct

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189. *See* MODEL PENAL CODE § 213.1 cmt. 2 at 280 (1980) (criterion of "prior companionship" reduces degree of offense because "[i]ts presence reduces confidence in the conclusion of aggression and nonconsent, and *seems relevant as well to the degree of injury inflicted and the general dangerousness of the actor.*" (emphasis added)).

190. *Seaboyer*, [1991] 2 S.C.R. at 685 (L'Heureux-Dube, J., dissenting)(commenting on the relevance of a complainant's prior sexual history in general).

191. *Cf.* People v. Liberta, 474 N.E.2d 567 (N.Y. Ct. App. 1984); West, *supra* note 27, at 64-65.

192. MODEL PENAL CODE § 213.1 cmt. 8(e) (1980).

193. *See generally* Kathy Mack, *Continuing Barriers to Women's Credibility: a Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327 (1993) (exploring how the male dominated legal system perpetuates the subordination of women by promoting disbelief in women's stories of rape).

194. 3A WIGMORE ON EVIDENCE §§ 983-986 (Chadbourn rev. 1970).

195. MCCORMICK ON EVIDENCE, *supra* note 155, § 41.

196. FED. R. EVID. 608(b) provides in part:

> Specific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness

satisfying this standard should involve dishonesty, misrepresentation or other false statement, e.g., forgery, suppression of evidence, false pretenses, cheating or embezzlement,[197] perjury or subornation of perjury,[198] lying on government applications,[199] or deceptive practices.[200] Under this rule, evidence of other "bad acts" is not generally admissible for the purpose of impeaching credibility,[201] as it was in England.[202]

However, until the 1970s evidence of a rape complainant's *prior sexual acts* with men other than her husband continued to be deemed relevant to, and therefore admissible to impeach, her credibility.[203] Thus, her sexual history or "chasteness" was directly equated with a propensity to lie, at least about sexual matters. While this rule may have been developed during the ascendance of Puritanism[204] in English society and would be logical for the time in which it was developed, it is not applied uniformly to men and women in all criminal trials.[205] Nor is the rationale rational in the context of modern mores. Evidence of the prior sexual history of an accused not resulting in conviction for a crime was inadmissible because it was deemed to be too prejudicial.[206]

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or untruthfulness, or (2) concerning the character for truthfulness or untruthness of another witness as to which character the witness being cross-examined has testified.

Id. This rule was based on one originally prescribed by the Supreme Court. *See* JON R. WALTZ, THE NEW FEDERAL RULES OF EVIDENCE 92-93 (2d ed. 1975).

197. United States v. Page, 808 F.2d 723 (10th Cir. 1987).

198. United States v. Amahia, 825 F.2d 177, 181 (8th Cir. 1987).

199. United States v. Beros, 833 F.2d 455 (3d Cir. 1987).

200. United States v. Fulk, 816 F.2d 1202 (7th Cir. 1987).

201. MCCORMICK ON EVIDENCE, *supra* note 155, § 41.

202. *Id.* § 41 n.31 and cases cited therein. At the other extreme, a few courts prohibit all such evidence. *Id.* n.32.

203. *E.g.*, State v. Sibley, 33 S.W. 167, 171 (Mo. 1895); *Seaboyer*, [1991] 2 S.C.R. at 667 (L'Heureux-Dube, J., dissenting).

204. THE PURITAN REVOLUTION ix-xxii (Stuart E. Prall ed., 1968). Matthew Hale was greatly influenced by the Calvinist belief-system of the Puritans, by whom he was trained in his youth. *See* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1703-05, 1722 (1994).

205. Sibley, 33 S.W. at 171; *Seaboyer* [1991] 2 S.C.R. at 667 (L'Heureux-Dube, J., dissenting).

206. *See* MCCORMICK ON EVIDENCE, *supra* note 155, § 42 at 144 (only crimes punishable by death or imprisonment exceeding one year could be used against a criminal defendant, and then only if the court determines that the probative value of the conviction outweighs its prejudicial effect on the defendant).

A 1980 decision of the Supreme Court of Canada[207] on this subject illustrates the difficulty of changing the framework through which traditional rules and rationales are viewed. Because the credibility of a non-party witness is a collateral issue, general rules of evidence permit questioning a complainant about specific instances of sexual activity with men other than the defendant (assuming prior sexual history is deemed relevant), although no extrinsic evidence could be offered to contradict her denial of such activity.[208] Under the common law, this rule permitted virtually unlimited inquiry into a complainant's prior sexual history. In Canada, a "rape shield" statute was enacted in 1976[209] to restrict such fishing expeditions, which greatly contributed to rape complainants' feelings that they, rather than the accused, were on trial. The constitutionality of the statute was challenged before the Supreme Court of Canada in *Forsythe v. The Queen*.[210] A majority of the Court decided that Parliament must have intended to "balance" the explicit new "protection" afforded the complainant with unstated new rights for the defendant.[211] Consequently, the Supreme Court held that the defendant could compel the complainant's testimony on his behalf at the required *in camera* hearing. Furthermore, if cross-examination of the complainant with respect to specific sexual activity with other men were permitted at trial,

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In a significant shift, new Federal Rule of Evidence 413, permitting consideration of evidence of similar crimes by a defendant in sexual assault cases, was adopted in 1994 along with new rules permitting similar evidence in cases involving child molestation. See FED. R. EVID. 413, 414, 415. Both parts of this reform appear to be attributable to the increased public concern about repeat child molesters.

207. Forsythe v. The Queen, [1980] 2 S.C.R. 268 (Can.). At the time of this decision, seven men and no women sat on the Canadian Supreme Court. JAMES G. SNELL & FREDERICK VAUGHAN, THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION app. (1985).

208. *See, e.g.*, State v. Bowman, 61 S.E.2d 107 (N.C. 1950); *Seaboyer*, [1991] 2 S.C.R. at 672 (L'Heureux-Dube, J., dissenting); MCCORMICK ON EVIDENCE, *supra* note 155, §§ 41, 49; 3A WIGMORE ON EVIDENCE § 979 (Chadbourn rev. 1970).

209. Criminal Law Amendment Act, 1975, S.C. 1974-75-76, c. 93, § 8, *codified at* CRIM. CODE CAN., R.S.C. (1975), c. C-34 § 142. The statute provided that a complainant could not be questioned as to her sexual conduct with a third party unless notice of such questions and the evidence sought to be adduced was given to the prosecutor and the court determined, following an *in camera* hearing, that "the weight of the evidence is such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant." *Seaboyer*, [1991] 2 S.C.R. at 670 (L'Heureux-Dube, J., dissenting).

210. *Forsythe*, [1980] 2 S.C.R. 268.

211. *Seaboyer*, [1991] 2 S.C.R. at 672-73 (L'Heureux-Dube, J., dissenting); *Forsythe*, [1980] 2 S.C.R. at 274, 276.

the defendant could call other witnesses solely for the purpose of impugning her credibility.[212] Thus, the complainant's credibility was elevated by the court from a collateral to a material issue.[213] As pointed out by the dissenting justices in *Seaboyer*, the *Forsythe* decision retipped the balance of justice back toward the accused, when Canada's legislature had tried to eliminate the undue prejudice for the complainant that tended to result from such evidence.[214]

D. Judicial Discretion

Whenever legal rules explicitly give the judge "discretion" over an issue, an opportunity to insert and act on biases and personal values is created.[215] Situations in which a judge may exercise discretion include deciding admissibility of evidence— especially evidence related to a complainant's prior sexual history, ruling on other types of motions, "leading" jurors through the judge's demeanor and other subtle behavior, and instructions to the jury.[216] In most states, prior to the reforms brought about in the 1970s, judges decided whether specific instances of the complainant's prior sexual conduct with men other than the accused were admissible for purposes of either showing her propensity to engage in extramarital sex[217] or impeaching her credibility.[218] In some states the judge's discretion determined whether a defendant's request for a psychiatric examination of the complainant

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212. *Forsythe*, [1980] 2 S.C.R. at 274-75.

213. *Seaboyer*, [1991] 2 S.C.R. at 671 (L'Heureux-Dube, J., dissenting); *Forsythe*, [1980] 2 S.C.R. at 274-75.

214. *Seaboyer*, [1991] 2 S.C.R. at 672-73 (L'Heureux-Dube, J., dissenting). The Canadian Parliament responded to the *Forsythe* decision by enacting the statute declared unconstitutional in *Seaboyer*. *Id.* at 674-78.

215. *See generally* Lisa A. Binder, *'With More than Admiration He Admired': Images of Beauty and Defilement in Judicial Narratives of Rape*, 18 HARV. WOMEN'S L.J. 265 (1995); *see also* Gary D. LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROB. 389, 393 (1985); Scheppele, *supra* note 124, at 1104-05.

216. MARSH ET AL., *supra* note 87, at 58-59. The authors report an instance after enactment of Michigan's landmark reformed sexual assault statute in 1975 where the judge granted the defense attorney's request for a jury instruction that consent was implied because the complainant did not scream when she was attacked. *Id.*

217. 1A WIGMORE ON EVIDENCE § 62 (Tillers rev. 1983).

218. 3A WIGMORE ON EVIDENCE § 924a (Chadbourn rev. 1970). Judicial discretion is still crucial for determining the admissibility of prior sexual history evidence under many reform statutes that generally exclude such evidence. SPOHN & HORNEY, *supra* note 122, at 164-65; Ordover, *supra* note 167, at 120.

would be granted and the results of the examination used for impeachment purposes.[219]

The institutional pressures on judges to avoid reversal are significant. If the defendant is convicted, the judge may be reversed by an appellate court for failure to provide the defendant opportunity to cross-examine the complainant and her testimony or for failure to admit evidence arguably favorable to the defendant. However, the state may not appeal an acquittal. A judge may therefore feel it is safer and easier for everyone (except the complainant) to admit any proffered evidence on the complainant's sexual history or other matters of reputation. That way the judge need not worry about reversal on appeal.[220] The need to separate the effects of such institutional pressures from the effects of judges' stereotypical view of rape victims make the social science research cited throughout this paper essential.

The jury exercises similar discretion when it decides whether the evidence proves beyond a reasonable doubt that a complainant was coerced by the defendant's greater size and weight to acquiesce in sexual intercourse.

Some of this discretion, particularly that exercised by the jury, is unavoidable. However, in many jurisdictions the courts' discretion concerning admissible evidence has been limited by exclusionary rules such as rape victim shield laws adopted by either the legislature or the jurisdiction's highest court.[221]

E. Individual Redefinitions of the Offense

A male view of reality can also distort the search for truth in rape prosecutions when police, prosecutors and juries substitute their own ideas of what constitutes "real rape" for the offenses proscribed by the legislature. A number of reformers and social science analysts have explored the exercise of discretion by police in making "founded" or "unfounded" decisions about sexual assault

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219. 3A WIGMORE ON EVIDENCE § 924a n.1 (Chadbourn rev. 1970).

220. FEILD & BIENEN, *supra* note 26, at 102, citing S. Mathiasen, *The Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L. REV. 36 (1974).

221. *But see Seaboyer*, [1991] 2 S.C.R. at 630-36 (noting that the statute, which barred the defendant from introducing evidence of complainant's sexual activity with other persons except for limited purposes and after the judge has determined in a closed hearing that the evidence serves the stated purpose, was declared invalid under the Canadian Charter of Rights and Freedoms and the Supreme Court established "guidelines" based on Professor Harriet Galvin's 1986 article; *see* Galvin, *supra* note 185).

reports and by prosecutors in deciding whether to issue arrest warrants and prosecute alleged assailants.[222] In both circumstances, stereotypes and related attitudes about the complainant's culpability held by criminal justice personnel can and often do override even explicit definitions of sexual assault crimes.[223]

Similar transformations occur in the jury room. One study of jurors who had served in rape trials in Indianapolis, Indiana explored whether the jurors were influenced by their views of women's role in society or by evidence submitted at trial concerning the complainant's "bad character," i.e., any evidence that the complainant drank or used drugs, engaged in sexual activity outside marriage, or had met the defendant in a bar or hitchhiking.[224] The study revealed that whenever the defense questioned the complainant's status as a victim by claiming that she had consented or that intercourse never took place, any "bad character" evidence tended to increase the likelihood that the jurors who held traditional sex-role stereotypes would acquit the defendant.[225] Even when the defendant's defense did not involve the complainant's status as a victim (i.e., when the defendant claimed that the rape was committed by someone else or that his own insanity or intoxication had diminished his responsibility for his actions), sex-role conservative jurors were still more likely to consider the defendant innocent if evidence of the complainant's "bad character" was offered.[226] On the other hand, evidence that the defendant had used a weapon or that the complainant was injured would appear highly probative of the complainant's forced submission to sexual intercourse against her will. Yet such evidence did *not* significantly affect the jurors' judgement, even where the complainant's status as a victim was at issue.[227]

Various studies, supported by extensive anecdotal evidence, have also shown that most prospective jurors believe acquaintance rape is relatively rare[228] despite the fact that crime statistics[229]

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222. LaFree et al., *supra* note 215, at 393.

223. *See generally*, MARSH ET AL., *supra* note 87, at 85-104.

224. LaFree et al., *supra* note 215, at 397-99.

225. *Id.*

226. *Id.* at 399.

227. *Id.* at 397; *see also* BOURQUE, *supra* note 45, at 199; FEILD & BIENEN, *supra* note 26, at 119.

228. FEILD & BIENEN, *supra* note 26, at 76; KATZ & MAZUR, *supra* note 35, at 205-14.

229. MENACHEM AMIR, PATTERNS OF FORCIBLE RAPE 229-52 (1971); KATZ & MAZUR, *supra* note 35, at 115; UNIFORM CRIME REPORT, *supra* note 57.

and social science research[230] indicate the contrary. Jurors remain more likely to infer consent whenever the complainant and defendant were acquainted prior to the alleged sexual assault.[231] This is true even where the acquaintance was brief and did not indicate "bad character" in the sense that meeting in a bar or hitchhiking might be considered, under certain moral codes, to indicate questionable character. One study even showed that evidence of prior acquaintance resulted in a lower conviction rate at trials where the main defense was mistaken identity, despite the logical conclusion that the victim's prior acquaintance would have rendered her identification more credible.[232]

These studies are consistent with claims of feminists and female college students that date rape is widespread and, until very recently, not taken seriously.[233] Crime statistics obviously do not explain these attitudes. The stereotypical views that a woman cannot be raped against her will, that "real rape" involves strangers, and that claims of acquaintance rape are largely fabricated do explain the failure of society and the criminal justice system to deal seriously with rapes committed by acquaintances.

These and other studies reveal that jurors' decisions in rape trials are consistently affected by information which is irrelevant to legal definitions of rape. Factors such as the defendant's race, the complainants' race, the combination of their races;[234] whether the

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230. See *supra* note 26.

231. FEILD & BIENEN, *supra* note 26, at 4, 76-78; LaFree et al., *supra* note 215, at 397-99.

232. LaFree et al., *supra* note 215, at 399.

233. *E.g.*, ESTRICH, *supra* note 25, at 12-13; Collison, *supra* note 114, at A1.

234. FEILD & BIENEN, *supra* note 26, at 79-80, 102, 106-07, 116-19, 125-28. Half of the prospective jurors in Feild and Bienen's study believed that rape occurs primarily between black men and white women. *Id.* at 80. The prospective jurors were prepared to punish black men whom they believed had raped white women more severely than guilty white defendants or black defendants believed to have raped black women. *Id.* at 118. In fact, statistics show that 78 percent of all rapes involve black victims and black offenders, 16 percent involve white victims and white offenders, and only 4 percent involve white victims and black offenders. *See* AMIR, *supra* note 229, at 44. The remaining 2 percent must include rapes involving black victims and white offenders and all other interracial or intraracial rapes. The problem with the statistics, of course, is that they represent only those rapes where the victim reported the incident, the police pursued the evidence, the prosecutor indicted and the jury convicted. Such statistics have little to tell us about the actual frequency of rape within ethnic groups. *See* MODEL PENAL CODE § 213.1 cmt. 3(a) (1980); *see generally* CHARLES HERBERT STEMBER, SEXUAL RACISM (1976).

Because 94 percent of rapes involved an offender and a victim of the same race, prosecutors tend to want evidence that a particular offender and victim were of different races to show the *lack* of probability of consent. Relying on such evidence ignores the bias

complainant drinks or has used drugs; whether she is a runaway teenager, unemployed, separated, divorced or living in a common law relationship;[235] and whether the complainant and defendant knew each other, or even had just met and engaged in a brief conversation, were all significant factors determining trial outcomes, regardless of the specific legal issues raised at trial. The factors involving prior sexual history were precisely the kind traditionally permitted by special evidentiary rules.

These jury studies make it clear that many of the myths or stereotypes about rape have been and continue to be held by women who have assimilated a high degree of sex role stereotyping into their reasoning process.[236] Indeed, most people label the male perspective the "traditional" view of sex roles in our society. However, it seems safe to conclude that these stereotypes did not originate with women. As we have seen, many stereotypes were implicit in Lord Hale's treatment of rape. In the seventeenth century women did not participate in the legal system or in any other socially influential institutions. As numerous feminist histories have made abundantly clear, that has remained largely true until very recently.[237] Furthermore, men are significantly more accepting of rape myths and violence against women than are women.[238] Therefore, whoever may express or act upon these stereotypes in specific instances, the stereotypes themselves clearly reflect a partial view of reality that fails to account fully for women's experiences.[239]

While the male-oriented rules governing common law rape trials were developed by lawyers (often with the conscious purpose of favoring male defendants), the male-oriented presuppositions underlying many of these rules originated as general cultural assumptions. However, once such a set of biased or "perspectived" assumptions have been taken into the structure of a cultural institution like the legal system, it rarely vanishes or withers away of its own accord. Biased assumptions must be identified, articulated and

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in the statistics and the high probability of prejudice against either a black accused or a black complainant.

235. Clark & Lewis, *supra* note 54.

236. *See* Check & Malamuth, *supra* note 26, at 345.

237. *See generally*, 1 & 2 BONNIE S. ANDERSON & JUDITH P. ZINSSER, A HISTORY OF THEIR OWN: WOMEN IN EUROPE FROM PREHISTORY TO THE PRESENT (1988).

238. FEILD & BIENEN, *supra* note 26, at 50-53; Check & Malamuth, *supra* note 26, at 347.

239. West, *supra* note 12, *passim*.

debated. Since all institutions are inherently self-conserving and therefore heavily weighted more toward inertia than change, forceful advocacy is required to eliminate, modify or ameliorate such biased perspectives.

III. The Women's Movement and Statutory Rape Reform

A. Achieving Statutory Reform

In the mid-1970s the women's movement, coupled with women who had entered the legal profession, joined law and order groups and other traditional political organizations such as the League of Women Voters and the American Civil Liberties Union to create a strong tide of rape law reform in state legislatures across the United States.[240] Due to the varying characteristics of voter and legislator populations, each statute represents a balance of local compromises between reformer pressures and legislative perceptions of the desirability and popularity of reform.[241]

By 1985, England, Canada, and almost all American jurisdictions, including the federal courts,[242] had enacted "rape shield laws" that exclude some or most evidence of a complainant's prior sexual history from admission at trial.[243] The remaining states adopted similar bars by judicial decision.[244] Many jurisdictions also enacted statutory definitions of rape or sexual assault that emphasize the use of force or coercion by the attacker and eliminate either all mention of the complainant's resistance or at least the requirement of "utmost resistance." A few states even eliminated any express reference to the complainant's lack of consent as an element of the offense.[245]

Many of the new statutes also eliminated the term "rape" and defined a range of criminal conduct denoted as different degrees of

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240. FEILD & BIENEN, *supra* note 26, at 188 n.3. As of 1992, all major jurisdictions had effected rape law reforms, most through legislation and a few solely through case law. SPOHN & HORNEY, *supra* note 122, at 81. Many of the new statutes had been preceded by significant decisional reforms. *Id.* at 80.

241. FEILD & BIENEN, *supra* note 26, at 153-54.

242. *See* FED. R. EVID. 412.

243. *See* 1A WIGMORE ON EVIDENCE § 62, 1264 n.11 (Tillers rev. 1983); David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence,* 1985 WISC. L. REV. 1219, 1219-20.

244. *See* 1A WIGMORE ON EVIDENCE § 62 n.12 (Tillers rev. 1983); State *ex. rel.* Pope v. Superior Court, 545 P.2d 946 (Ariz. 1976).

245. See, e.g., MICH. COMP. LAWS §§ 750.520b-520e (1991); 2C N.J.S.A. § 14 (1979 & Supp. 1996).

sexual assault or criminal sexual conduct bearing different degrees of punishment.[246] Prior to these reforms the common law offense of rape generally carried a penalty ranging from execution and life imprisonment to 20 years imprisonment. Experience had shown that, because of the severity of these penalties, many juries were unwilling to convict defendants for any rape other than those involving aggravated assault and serious injury[247] or rapes of white women by black men.[248] Consequently, at the request of women's advocates and law and order groups, the new penalties prescribed for the degree of sexual assault most nearly equivalent to the common law offense of rape were reduced in the hope that more convictions would result.[249]

The definition of rape and the special evidentiary rules formulated for rape trials had not been widely questioned until the early 1970s. Why did this happen after so many centuries? The women's movement of the 1960s was clearly a key factor prompting the reform movement of the 1970s. For the first time, a relatively large number of women were examining issues that affect women in unique ways. As a result, women began to demand the political and structural changes in society necessary to eliminate gender bias from the discussion and resolution of those issues.[250]

Another key factor prompting the rape reform of the 1970s appears to have been the influx of a "critical mass" of women into the legal profession, women who were knowledgeable about the doctrine of rape and the rules applied to rape prosecutions. The percentage of women in the legal profession had remained constant

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246. FEILD & BIENEN, *supra* note 26, at 155-156; *see* MICH. COMP. LAWS §§ 750.520b-520e.

247. MODEL PENAL CODE § 231.1 cmt. 4a (1980).

248. *See supra* note 234.

249. MODEL PENAL CODE §§ 213.1(1); § 213.1 cmt.2 (1980).

250. *See* Fineman, *supra* note 10; Jennifer Nedelsky, *The Practical Possibilities of Feminist Theory*, 87 NW. U. L. REV. 1286 (1993). For some of the practical consequences of greater participation by women in the legal profession, see MONA HARRINGTON, WOMEN LAWYERS: REWRITING THE RULES (1994) and JUDITH G. GREENBERG, FEMINIST LEGAL THEORIES: INFLUENCING LAW AND LEGAL PROCESSES (1993).

Women lawyers also played important roles as legislators, even though their numbers have remained relatively low in Congress and most states. For example, the "primary sponsor" and "architect" of the rape shield provision added to the Federal Rules of Evidence in 1978 was Representative Elizabeth Holtzman (D. N.Y.). *See* 124 CONG. REC. 11944 (1978)(statement of Rep. James R. Mann).

at around 2 to 3 percent for several decades prior to 1970.[251] These numbers grew from 4.7 percent in 1970 to 12.8 percent in 1980,[252] 19.3 percent in 1989[253] and 22 percent in 1990.[254]

This growth is reflected in law school statistics. Few women were admitted to law school until the mid-1970s.[255] In 1970 and 1976 women comprised 7.8 percent and 28.4 percent of first year law students at a representative sample of 103 American law schools.[256] From 1980 through 1990 the percentage of women in incoming classes fluctuated between 40 and 42.7 percent, climbing to 44 percent in 1994.[257] If present law school admission trends hold, women will finally comprise 40 percent of the profession as a whole around 2010.[258]

After becoming lawyers, women have not been distributed as evenly throughout the profession. In 1980, for example, while private practice was the principal employment setting for both men and women, only 56 percent of women lawyers were in private practice compared to 70 percent of men.[259] Statistics are not readily available detailing the number of women who have become

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251. *Different Voices, Different Choices? The Impact of More Women Lawyers and Judges in the Justice System*, JUDICATURE, Oct./Nov. 1980, at 138, 140 Table 2.

252. Elyce H. Zenoff & Kathryn V. Lorio, *What We Know, What We Think We Know, and What We Don't Know About Women Law Professors*, 25 ARIZ. L. REV. 869, 870 (1983).

253. 1990 DEP'T OF COMMERCE, STATISTICAL ABSTRACTS OF THE U.S., Table 645 (110th ed.). In fact, in 1989, women comprised a lower percentage of practicing lawyers and judges than in any other profession in the United States other than dentists, clergy, engineers and geologists. *Id.*

254. Marina Angel, *Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799 (1988).

255. KAREN BERGER MORELLO, THE INVISIBLE BAR 101 (1986). While relatively few women applied to law schools, they were not encouraged to attend, either by the general culture or by the schools.

256. Zenoff & Lorio, *supra* note 252, at 870. *See also* A.B.A. COMM. ON WOMEN IN THE PROFESSION, WOMEN IN THE LAW: A LOOK AT THE NUMBERS 6 (1995) (hereinafter A LOOK AT THE NUMBERS).

257. *See, e.g.*, Ken Myers, *Law Schools*, NAT'L L.J. 4 (March 18, 1991); John C. Metaxas, *Law Schools*, NAT'L L.J. 2 (March 16, 1987)); A.B.A. COMM. ON WOMEN IN THE PROFESSION, ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION 1, n.1 (1996).

These percentages varied widely among individual law schools, especially the "top ten," which generally lagged these numbers considerably. For example, women were not admitted to Harvard Law School at all until 1950, although Harvard did hire Professor Soia Mentschikoff as a visiting professor of law from 1947 to 1949. Zenoff & Lorio, *supra* note 252, at 869. When New York University's enrollment of women law students reached 40 percent around 1975, it was unprecedented among the major law schools.

258. A LOOK AT THE NUMBERS, *supra* note 256, at 6.

259. *Id.* at 18-19.

state prosecutors, the lawyers responsible for prosecuting accused sexual offenders.[260] We do know that a much higher proportion of women than men become government lawyers of all kinds: 17 percent of women lawyers compared to only 9 percent of men.[261]

However, women state court judges, who would be responsible for managing rape and other sexual assault trials, still represent only a small proportion of trial judges in comparison to the total percentage of women in the profession. This is in part because judgeships presume significant professional experience. Having entered the profession in large numbers only since the late 1970s, women are still underrepresented as lawyers in all age groups above 30 years of age.[262] According to the American Bar Association Commission on Women in the Profession, women lawyers represent 35 percent of lawyers under 30 years of age and 32 percent of the lawyers ages 30 to 34, but only 4 percent of lawyers age 60 and above.[263] Still, the age distribution does not account for the overall discrepancy, particularly among lawyers in the lower age groups.[264]

In its 1995 statistical report the ABA Commission on Women in the Profession reported that "[f]rom 1980 to 1991, representation of women among state judges increased from 4% to 9%."[265] But progress has been uneven in this context as well. "For example, in late 1994, the Illinois Supreme Court appointed twenty-seven new Associate Judges for Cook County, the single largest Illinois Circuit accounting for almost 50% of all Illinois Circuit judges. None of

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260. As we saw earlier, police officers stand at another crucial point in the prosecution of sex offenders since police make initial decisions whether to investigate a complainant's story and whether to turn the case over to a prosecutor. The inclusion of women in law enforcement positions follows the same patterns revealed in the legal profession. For example, when the Police Foundation conducted a study of five sizable American cities in 1972, women constituted less than .5 percent of police officers working in the field in New York and Philadelphia and less than 2 percent in Dallas, Indianapolis and Washington D.C. Only in the comparatively smaller cities of Miami and Peoria, Illinois did women constitute more than 4 percent of police officers in the field. *See* CATHERINE MILTON, WOMEN IN POLICING 59, 62-74, 82-83, 90-91 (1972).

261. A LOOK AT THE NUMBERS, *supra* note 256, at 19 (Chart 13), 32-34. This distribution had begun to even out by 1991 but was still unbalanced. *Id.* It is not clear whether women prosecutors have comprised a constant proportion of women government lawyers of this period.

262. *Id.* at 13 (Chart 8).

263. *Id.*

264. *Id.* at 30 (Chart 25).

265. A LOOK AT THE NUMBERS, *supra* note 256, at 31.

the appointees was a woman."[266] The Commission also noted: "At about the same time, the Illinois Supreme Court also filled four appellate vacancies. None of the appointees was a woman."[267]

Looking just at state courts of last resort, as of 1992 only fifty-nine women had ever served on these courts,[268] with 91 percent having served since 1970 and almost 70 percent since 1980.[269] As of 1992, nine state courts of highest resort had *never* included a woman justice,[270] and only one such court, the Minnesota Supreme Court, had ever consisted of a majority of women.[271] Significantly, a recent study of role orientations among women state supreme court judges concluded that women state appellate judges do tend to act as the most pro-women members of their courts when faced with issues of special concern to women.[272]

As a consequence, the impact of women lawyers on the actual prosecution of sexual offenders is still minimal. Instead, the greatest impact has come through the scholarship of women on law reviews and law faculties.[273] While women are similarly underrepresented on law faculties, especially in tenured and tenure track positions,[274] the number of scholarly articles on rape, most

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266. *Id.*

267. *Id.* at 54 n.26. "A spokesman for the court is reported by the *Chicago Sun-Times* to have said, 'There was "no intent whatsoever" to exclude women'." *Id.*

268. David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156-57 (1993).

269. *Id.* at 158.

270. *Id*, at 156-57.

271. *Id.* at 162.

272. *Id.* at 161, 165. *See also* Elaine Martin, *The Representative Role of Women Judges*, 77 JUDICATURE 166 (1993).

273. Law faculty not only contribute the bulk of legal scholarship; they also exert the first and perhaps the strongest influence on each new generation of lawyers. Thus, law faculty influence their students by being role models, by the seminars and electives that they choose to teach, and by the materials and approaches that they select to present required courses.

274. Law school teachers are typically hired to teach around five years after graduation from law school. As such, the number of women faculty numbers should be expected to track the percentage of women students, allowing for approximately a five year log, more closely than the percentage of women in the profession as a whole. In fact, however, women comprised less than 2 percent of law teachers in 1967 and less than 15 percent of all full-time tenure track teachers in 1982. Zenoff & Lorno, *supra* note 252, at 780-81. In 1982, 54 percent of newly hired female law teachers received non-tenure track positions. This is in comparison with the 28 percent of male law teachers to receive such positions. *Id.* at 873.

In 1983, women comprised 32 percent of clinical law teachers and 60 percent of legal writing teachers. Yet, women held only 15.7 percent of all classroom teaching positions. Thus, women teachers were underrepresented in the positions which are more prestigious,

written by women, appears to have jumped far beyond the increase in the number of law reviews published.

Thus, there is evidence that identification of the stereotypical biases and analytical anomalies in the law of rape coincided with the first decade in which women participated in more than token numbers in most aspects of the legal system. Women in the 1960s perceived intuitively and articulated the stereotypical prejudice inherent in the prosecution of rape complaints in terms of fairness or justice. Only in the 1970s were the doctrinal sources of the prejudice analyzed in terms that could be translated into law reform. The intuitions of women prompted social scientists (who included significant numbers of women for the first time) to conduct research which, study by study, has shown that the actual effect of established doctrine and its application, as well as the effect of uncodified stereotypes, have been largely at odds with the primary goals of those who formulated the doctrine: insuring fair trials for defendants, protecting women, enhancing public morals and safeguarding public security.[275]

One attempt at rape reform did occur prior to 1970. The American Law Institute's Model Penal Code project included work on rape and related offenses in the 1950s. It is instructive to compare the rape reform models of the mid-1970s with the provisions of the draft Model Penal Code provisions on rape submitted to the members of the American Law Institute for discussion at their 1955 annual meeting (hereinafter referred to as the "1955 Draft MPC").

The 1955 Draft MPC rejected traditional views in three substantial respects. First, the 1955 Draft MPC rejected the prevalent standard concerning a requisite showing of resistance by the complainant.[276] The comments to Section 207.4 of the 1955 Draft MPC made clear that, in a majority of the jurisdictions surveyed, the law required a showing that the complainant had

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well-paid and secure. Richard H. Chused, *Faculty Parenthood: Law School Treatment of Pregnancy and Child Care*, 35 J. LEGAL EDUC. 568, 572 (1985).

275. *Cf.*, Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, No. 77, at 29 (Apr. 22, 1982) (Statement of the Honourable Jean Chretien, Minister of Justice and Attorney General of Canada) (four basic principles underlying 1982 Canadian reforms were "the protection of the integrity of the person, the protection of children and special groups, the safeguarding of public decency, and the elimination of sexual discrimination") (cited in *Seaboyer*, [1991] 2 S.C.R. at 675 (L'Heureux-Dube, J., dissenting)).

276. MODEL PENAL CODE § 207.4 (Tentative Draft No. 4, 1955).

resisted "to the utmost."[277] This formulation was also endorsed by all of the scholarly literature cited as on point.[278] The drafters made clear that they were seeking to avoid any formulation under which the complainant would need to have been "physically incapable of additional struggle against her assailant" in order for the defendant to be convicted.[279]

Second, the 1955 Draft MPC adopted two standards which better reflected differences between men and women. The first standard imposed criminal sanctions where the complainant has submitted to the sexual advances out of "fear" of violence, "without requiring that the fear be reasonably grounded."[280] The drafters adopted this subjective standard with the hope of discouraging men from taking advantage of possibly unreasonable fears of violence that individual women might have.[281] The second standard posited an objective "reasonable woman" standard for the third degree of the offense, thereby providing for conviction if the defendant compelled the complainant "to submit by any intimidation"[282] that might "prevent resistance by a woman *of ordinary resolution.*"[283] In the context of the "reasonable [male] victim" standard generally applied at that time, this change was a significant reform by the drafters of the 1955 Draft MPC.

Third, the kinds of effective threats which could lead to conviction were broadened from only threats of bodily harm to the woman, as was common under many statutes, to include threats to her family.[284]

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277. *Id.* § 207.4 cmt. 6.

278. *Id.* § 207.4 cmt.6 n.11 (citing I. DRUMMOND, THE SEX PARADOX 103 (1953); M. PLOSCOWE, SEX AND THE LAW 191 (1951); Dworkin, *supra* note 42, at 58).

279. *Id.* § 207.4(1) cmt. 6.

280. *Id.* This standard was used in only a minority of United States jurisdictions at that time. *Id.* § 207.4 cmt.6 n.112.

281. MODEL PENAL CODE § 207.4(1); § 207.4(1) cmt. 6 (Tentative Draft No. 4, 1955).

282. "Intimidation" became "threat" in the Final Draft of the Model Penal Code adopted in 1962. *See* MODEL PENAL CODE § 213.1(2) (1980).

283. MODEL PENAL CODE § 207.4(2)(a) (Tentative Draft No. 4, 1955) (emphasis added).

284. *Id.* § 207.4(1)(a). The 1955 Draft MPC also supported conviction for first or second degree rape for threats "to commit any felony of the first degree," *e.g.*, a threat to murder a friend or even a stranger, but this language was dropped from the final Model Penal Code in 1962, making such coercive intercourse punishable as third degree gross sexual imposition rather than as first degree rape. *See* MODEL PENAL CODE § 213.1(a)(2) (1980).

In contrast, the final Model Penal Code retains a modified version of Lord Hale's cautionary instruction[285] and requires a prompt complaint by the victim in order for a prosecution to be brought at all (within three months of the alleged assault, reduced from six months under the 1955 Draft MPC).[286] Both the 1955 Draft MPC and the final Model Penal Code prohibit conviction for any rape related offense classed as a felony upon the uncorroborated testimony of the complainant.[287] The final Model Penal Code does make explicit that such corroboration might be circumstantial.[288] The Revised Comments, which were completed almost twenty years after the final text of the Model Code, clarify that corroboration is not needed for every element of the crime alleged, as had been required in at least one state.[289]

The Model Penal Code continues the marital rape exemption. The comments state that the exemption was retained on the ground that the degree of criminal harm is less within the marriage relationship.[290] It is difficult to separate this rationale from the old theory that a woman who marries or agrees to cohabit with a man thereby consents to all intercourse, including that which is coerced. The Model Code's exemption would not be available if the couple were living apart under a decree of judicial separation containing a non-cohabitation provision.[291]

Finally, that male confusion between coerced and consensual intercourse persists is demonstrated by the Model Penal Code's reduction of the degree of the crime if the victim is or previously had been the defendant's voluntary social companion and had *ever* permitted him sexual liberties.[292]

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285. "In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private." *Id.* § 213.6(5) (1980).

286. *Id.* § 213.6(4), 213.6 cmt.5 (1980); *cf.* MODEL PENAL CODE § 207.4(5) (Tentative Draft No. 4, 1955). However, when the complainant is under sixteen or incompetent, the complaint must be made within three months after her parent or guardian or other similarly interested person learns of the offense.

287. MODEL PENAL CODE § 207.4(5) (Tentative Draft No. 4, 1955); MODEL PENAL CODE § 213.6(5) (1980).

288. MODEL PENAL CODE § 213.6(5), 213.6 cmt.6 (1980).

289. *Id.* § 213.6 cmt.6 (1980) (referring to old New York rule).

290. MODEL PENAL CODE § 207.4, 207.4 cmt.4 (Tentative Draft No. 4, 1955); MODEL PENAL CODE §§ 213.1(1), 213.1(2), 213.6(2) (1980).

291. MODEL PENAL CODE § 213.6(2) (1980).

292. MODEL PENAL CODE § 213.1 (1980).

Comparing these Model Penal Code provisions with the common law of rape and the statutory reforms and feminist scholarship of the 1970s demonstrates that it took conscientious reform-minded men in the legal profession several centuries to recognize even a few of the anomalies between a balanced view of consensual sex and the traditional law of rape. These insights still did not result in significant reform until after women began to enter the legal profession in significant numbers. Only a few years later, large numbers of professional and lay women identified additional anomalies and began lobbying for change with a significant degree of success.

The conclusion that it took women to see what even liberal, reform-minded men at the top of the profession did not see is compelling. Significant reform occurred after women were admitted to law schools in significant numbers and more than a handful of women became prosecutors, defense lawyers, legislators and judges. These opportunities allowed women to become knowledgeable about the details of the law and how it is analyzed and changed. In addition, women began to engage in the analytical work necessary to demonstrate that the doctrine and rules about rape were not based on the same principles as other criminal doctrines, but instead expressed stereotypes about women that were, in the experience of most women, unwarranted. Reform required political pressure from women as well, pressure exerted on those with power to change the law—the still male-dominated legislatures. Significant insight and statutory reform did not come until both groups of people directly affected by the law of rape became significant participants in the legal system.

B. The Effects of the 1970s Reforms

The statutory changes wrought in the 1970s and 1980s have not had the dramatic impact on rape prosecutions that was anticipated by the reformers. Cassia Spohn and Julie Horney recently concluded a study of six major jurisdictions, including three where rape law reform produced "strong" statutes[293] and three where the reforms were considered weak.[294] The results indicate that the statutory reforms had little or no impact in most of the jurisdic-

293. Michigan, Illinois and Pennsylvania. SPOHN & HORNEY, *supra* note 122, at 41.
294. Washington, D.C., Georgia and Texas. *Id.* at 44.

tions.[295] In the three jurisdictions where the reformed laws state explicitly that victim resistance is not "required" to prove rape, judges and prosecutors agree that evidence of resistance is less important for prosecution and conviction than in the other three jurisdictions.[296] Evidence of a previous sexual relationship between the accused and the complainant and evidence of a complainant's reputation for promiscuity were both considered of less importance after the reforms in five of the six jurisdictions.[297] One state no longer required evidence of a prompt complaint,[298] and five of the six jurisdictions eliminated the corroboration requirement.[299] Nevertheless, prompt reporting of the offense continues to be important to obtaining convictions, and consequently continues to be important to the initial decision to prosecute.[300] Corroboration of the accusation, particularly by another witness, also continues as an important influence on the jury's willingness to convict in all jurisdictions.[301]

Changes in arrest, indictment, dismissal and conviction rates showed no overall patterns.[302] Rape reporting did increase to some degree in all jurisdictions. The greatest increase was in Michigan, where the strongest and most comprehensive reform was enacted and where the changes were made all at once. Even in Michigan, the pattern of reporting increases indicates that the publicity surrounding enactment of the reforms was the precipitating factor rather than the effects of the reforms on post-reform prosecutions.[303] However, other evidence indicated that, with the exception of Michigan, most or all of the change in rape reporting probably would have occurred even without the statutory reforms because of the general influence of the women's movement, which created greater awareness of the rape problem and "recognition of the need for greater sensitivity in the treatment of victims of rape."[304]

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295. *Id.* at 100.
296. *Id.* at 113-15.
297. *Id.* at 115.
298. SPOHN & HORNEY, *supra* note 122, at 95 (Pennsylvania).
299. *Id.* at 92-98 (all but Texas).
300. *Id.* at 115-16.
301. *Id.* at 116.
302. *Id.* at 67-74.
303. SPOHN & HORNEY, *supra* note 122, at 101-02.
304. The authors conducted time series analyses that compared the dates of reform in each jurisdiction with national trends. *Id. at 80-86.*

The impact of the reforms on officials' evaluation of sexual history evidence also failed to meet the reformers' expectations. "Informal norms," or norms not dependent on the applicable statutes, continued to have the largest influence on whether sexual history evidence would be admissible at trial. The only real change in the officials' evidentiary judgments concerned evidence that a complainant had engaged in prior sex with men she met in singles' bars. Judges, prosecutors and defense lawyers were convinced that such evidence "should not and would not be allowed in court. Many were adamant that such behavior was no one else's business and, furthermore, was irrelevant to the issues in the case."[305] However, the same respondents tended to believe that other evidence of prior sexual contact with men other than the accused should or would be admitted in their jurisdictions, generally on the basis of its probative weight.[306] The authors of the study suggested that most of the changes in attitudes about the admissibility of prior sexual history evidence resulted from changes in general societal attitudes.[307] Furthermore, even the strongest rape shield laws retained significant judicial discretion.[308] The laws affect only certain kinds of cases, which never included cases where the complainant was previously acquainted with the accused.[309] In addition, in acquaintance rape cases, corroboration and resistance evidence was still considered essential for obtaining convictions from juries, even where the statutes explicitly stated that such evidence was not required.[310] Consequently, victims of stranger rapes appear to have been the primary beneficiaries of most of the rape law reforms.[311]

Why weren't the reforms more effective? One key is the degree of discretion that judges retain in deciding whether particular evidence is relevant.[312] The jury system is another key;

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305. *Id.* at 153.

306. *Id.* at 153-54. The respondents apparently felt that such prior sexual contact constituted inappropriate conduct.

307. *Id.* at 80, 154.

308. SPOHN & HORNEY, *supra* note 122, at 164-65.

309. *Id.* at 166.

310. *Id.* at 159, 163. The authors noted that under statutes that do not require corroboration or resistance evidence, it is still within the prosecutors' and judges' discretion whether to give instructions to the jury on these points. *Id.* at 163.

311. *Id.* at 156, 163.

312. *Id.* at 164-65, 173. Spohn and Horney noted that official discretion tends to be exercised so as to thwart victim-oriented law reforms like those of the 1970s rape reform

juries can, in effect, mandate additional (and traditional) evidence before they will convict an accused of an acquaintance rape.[313] Another relevant factor is the ability of participants in the case-processing system of some jurisdictions, where there is a large degree of stability in the judges and lawyers who work together on rape cases, to reach informal agreements about the extent to which the law reforms would be implemented or thwarted.[314] Finally, as prior studies of criminal law reforms have found, the criminal justice system is characterized by tremendous "adaptive behavior" in law reform implementation.[315] A criminal law reform "that contradicts deeply held beliefs may result either in open defiance of the law or in a surreptitious attempt to modify the law."[316]

Given the disappointing results of the rape law reform effort when measured against the hopes and expectations of the reformers, was the effort worthwhile? Has feminist scholarship on rape made a difference? Spohn and Horney conclude that the symbolic message of the rape law reforms was important regardless of the small amount of substantive impact. They note that several years after the reforms, most of the criminal justice system participants interviewed strongly supported the reforms. These participants also believed the reforms "had resulted in more sensitive treatment of victims of rape."[317] The latter improvement is a major reform in and of itself.

In addition, even if the significant changes in rape reporting by women and in sensitivity to rape complainants by most participants in the legal system relate directly to general societal attitude shifts, the role of legal scholarship and social science research in educating the public cannot be discounted. Even if the general public does

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movement. Such reforms "are unlikely to facilitate the smooth and efficient flow of cases through the system, and are likely to conflict with officials' values concerning protection of the rights of defendants." *Id.* at 173. This highlights the importance of the small number of women judges. *See supra* notes 262-72 and accompanying text.

313. *See supra* note 310 and accompanying text.

314. In jurisdictions where a small number of judges handle all rape trials and prosecutors and/or legal aid lawyers are either assigned to handle all rape cases or to specific courtrooms, such informal agreements develop almost as a matter of course. SPOHN & HORNEY, *supra* note 122, at 66-67, 167-68.

315. *Id.* at 168 (citing Jonathan D. Casper & David Brereton, *Evaluating Criminal Justice Reforms,* 18 L. & SOC'Y. REV. 121, 123 (1984)). *See also* FEILD & BIENEN, *supra* note 26, at 205 n.142.

316. SPOHN & HORNEY, *supra* note 122, at 167 (quoting R.T. NAKAMURA & F. SMALLWOOD, THE POLITICS OF POLICY IMPLEMENTATION (St. Martin's Press 1980).

317. *Id.* at 175.

not read law reviews and social science journals, they do read the newspapers that report social science findings, pick up on newly evolving attitudes of the bench and bar, and, at least sometimes, listen to the jury instructions which have been reshaped as a result of new research and analysis. In addition, when many women who had been raped spoke out about the indignities and injustices of the prereform justice system, legal analyses from the victims' and reformers' viewpoint provided intellectual legitimacy for significant case law reform that often preceded statutory change, and for applying laws in a more balanced, less androcentric manner.

This review of rape law reform indicates that the exclusion of women from political and social power in the centuries prior to and after the seventeenth century has had deep and tenacious effects on how society is structured and how individual members of that society understand themselves and each other. Due to society's exclusion of women from positions of power, one set of opinions and values derived from a single perspective was believed to be the whole "objective" truth about women and rape. In actuality, they were only a range of opinions and values derived from one perspective, that of being male and part of the dominant and physically stronger group in society.

We have seen concretely that the attitudes of society thus formed helped shape the definition of rape and influenced significantly how general principles of evidence were applied to one special class of trials. We have seen that some men, despite being members of the dominant white male establishment, were able to see aspects of the bias that had been built into the law of rape and were moved to urge reform of the law. But even these men appeared to find it difficult to shed their traditional male perspective with respect to most aspects of the law they sought to reform.

We have seen that most ways in which the law of rape exhibits a one-sidedly male perspective remained unidentified until women began to examine the law and its consequences with the tools they gained from increased access to legal education. Transforming those new insights into reform of existing laws and practices in the legal system required women to articulate their own point of view in order for lobbying efforts to result in law reform. We also can conjecture that the leadership, insights and energy of women newly admitted to the legal community and the greater authority with which women lawyers could speak to legislators and other voters

were important components in achieving even the limited success of their reform efforts.[318]

It is clear that the process of reform is not yet concluded and must continue to depend on general education and political action.[319] While new insights and suggestions are continuing to appear in the scholarly literature, the immediate source of most change will continue to be the revised frameworks which judges, juries, prosecutors and police apply to rape prosecutions. The contributions of scholars will remain important for their cumulative effect on such actors.

IV. Conclusion: Implications for Other Legal Scholarship

This examination of rape law supports the claims of feminists and critical race scholars that members of a dominant community who are already part of the established legal community cannot expect to understand, either automatically or solely through the prism of their own experiences, the many ways their view of reality is shaped and sometimes distorted by their own perspective.[320] Members of a dominant community need to engage in dialogue with non-dominant community members to see legal issues, as well as other issues, from broader perspectives that are essential for formulating a balanced view.

These questions are of growing importance in the United States because they address core issues for every pluralist democratic society. They are intimately related both to the liberal tradition, with its emphasis on individual self-realization of the greatest numbers of people, and to the important civic republican tradition, with its emphasis on the role of law and government in

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318. MARSH ET AL., *supra* note 87, at 18-19.

319. A few scholars believe the statutes that bar use of prior sexual history evidence for purposes of proving consent, e.g., "pattern of conduct" evidence, go too far. Many defense lawyers claim their clients have been unfairly disadvantaged by the recent reforms. However, those views are not widely shared among even male judges and prosecutors. *Id.* at 79. *Cf.* SPOHN & HORNEY, *supra* note 122, at 155 (noting that the concerns of rape shield law critics that relevant sexual conduct evidence would be excluded were largely unfounded).

320. *See* A. Leon Higginbotham, Jr., *Foreword*, in GERALDINE R. SEGAL, BLACK IN THE LAW xiv (1983). "[T]he long-term and persistent underrepresentation of blacks in the legal system reflects in itself . . . the absence of advocates who could identify most with the problems of blacks when critical decisions were being made about the direction and destiny of society." *Id.* at xiv.

discovering and effectuating the *common good* and not merely the best interests of the elite or dominant class.[321]

Diversity of participants in all roles within the legal system is essential before the system can evaluate the claimed objectivity or neutrality of the value choices made by the traditionally dominant or fully included segments of society.[322] When the dominant reality has been constructed without the participation or perspective of a group of directly affected people, those who are excluded or disempowered may hold the key to some of the most important aspects of the truth. That was true about slavery. It is true about rape, even if neither major perspective neatly resolves the question of how to take account of the whole reality while preserving the most important values of our criminal justice system. Americans will undoubtedly find that previously excluded viewpoints furnish important keys for understanding other areas of law as scholarship broadens its scope.

The apparent or facial neutrality of a doctrine, rule or system is no guarantee of neutrality. Nor are sincerely held goals of fairness and justice. Many of the real questions simply never arise until a diversity of perspectives becomes manifest. To provide society with that diversity of perspectives, it is necessary to provide each community within society with an opportunity to contribute to the debate over time and in significant numbers.[323] Only after such an opportunity will society have any assurance that the legal community may be taking account of all perspectives relevant to a particular debate.

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321. *See* Edward A. Gargan, *Indian Myth Sharpens Reality of Religious Strife*, N.Y. TIMES, Dec. 22, 1991, at 10 (noting that a professor of analytical philosophy at Lucknow University in India reported that many Indians "feel that the nation's pluralism and secularist principles are under siege" because the Hindu majority of the country is experiencing a "terror psychosis that the Hindus might be eliminated and India might be declared an Islamic raj" even though Muslims make up only 10 or 12 percent of the population).

322. *Compare* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) *and* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978), *with* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) *and* Mary O'Brien & Sheila McIntyre, *Patriarchal Hegemony and Legal Education*, 2 CAN. J. WOMEN & L. 69, 74 (1986) ("the consensual state has as a condition of its success the need to present itself as a *just* state, as well as to objectify the principle of justice in a visible legal system") (emphasis in the original).

323. As we have seen, substantial time is required to effect legal reforms that relate to unconscious assumptions in addition to explicit rules, as well as simply to assess the effects of the reforms.

In a democracy, so long as the legal institutions and the scholars who think about them do not fairly reflect the composition of the society with respect to any characteristic exerting a significant impact on the lives of a community within, then diversity as a qualification, however "merit-extraneous" in some contexts, must become a positive qualification. Without such diversity, we will not be able to share the diversity of viewpoints necessary to implement our deepest democratic values.